Supreme Court, U.S.
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UNITED STATES SUPREME COURT

In the Matter of

B. Bruce Kittrell

No. 40896

A Member of the State Bar

Petition for a Writ of

Certiorari to the California Supreme Court

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QUESTIONS PRESENTED

1. May an employee of a State Bar summarily take an attorney's license to practice law?
2. May an attorney's license to practice law be summarily taken by a State Bar employee who recommends disbarment with no evidence?
3. May an attorney's license to practice law be summarily taken when there is no prompt, post-taking final adjudication ?
4. May an attorney's license be taken summarily by a State Bar employee when all other attorneys are entitled to final action by their licensing court prior to a taking?
5. May an attorney's license to practice law be taken summarily when the attorney in two trials has been barred from defending himself?
6. May an attorney be subject to a second trial when a first trial is reversed for insufficiency of the evidence in an attorney disciplinary proceeding?
7. May an attorney be subject to a second trial when an appellate entity changes the charge after the trial, finds automatic culpability, then remands to find the facts to support the guilt finding of its new charge it just made?
8. Is the claim that a punitive damage award is ipso facto an act of moral turpitude justifying disbarment and an emergency suspension by a State Bar employee unconstitutional for vagueness as applied?
9. Is not an act of moral turpitude as a cause for

disbarment unconstitutional for over breadth?

PARTIES

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B. Opinion on Review, Review Department of the State Bar Court of California, Filed October 26, 2000

C. Decision on Remand and Order of Involuntary Inactive Enrollment, State Bar Court-Hearing Department, Filed December 20, 2002

D. Verified Petition for Interlocutory Review and Application for Stay, Filed by Petitioner before California Supreme Court, Filed February 6, 2002

UNITED STATES SUPREME COURT

In the Matter of

B. Bruce Kittrell

No. 40896

A Member of the State Bar

Petition for a Writ of

Certiorari to the California Supreme Court

I.
Introduction

This is the second petition presented to this Court concerning the conduct of the State Bar of California. See In re: Kittrell Docket no. 00-1873.

The petitioner is an attorney at law for thirty-five years. He has no record of any offense. A State Bar employee ex parte took the attorney's license to practice law on December 20, 2001. He admitted he had no evidence. Exhibit C:3. He shall do so again on February 13, 2002. Exhibit D:1.

This case concerns a second trial following a reversal for insufficiency of the evidence at the first trial, the appellate entity changing the moral turpitude charge to a claim that a punitive damage award is ipso facto an act of moral turpitude, finding automatic guilt of its new charge, remanding to find the facts to support the guilt finding already made, then no evidence being presented at the second trial, another change in the charge and a recommendation of disbarment with no evidence, and the attorney barred from defending himself in both trials, then an ex parte taking of the attorney's thirty five year blemish-free license by a State Bar employee, and now a summary taking of the attorney's thirty five year license by this same State Bar employee with no court access or review.

The constitutional issues concern the first amendment, due process and equal protection rights of an attorney in an attorney disciplinary proceeding. Notice, changes in charges after trial, twice tried for the same offense, barring rights to defend, guilt with no evidence, and now an adjudicator who is prohibited from deciding constitutional issues and is a private employee of a prosecuting party with no evidence ex parte taking the attorney's license on December 20, 2001 while all other attorneys are entitled to action by their licensing court and now this same State Bar employee summarily taking the license with no prompt, post-taking final adjudication and no court of law involved to entertain any review.

The American Bar Association voted to disapprove of the California attorney disciplinary system.[1] A State Bar of California employee on February 13, 2001 shall, once again, summarily take the attorney's thirty-five year license to practice law in retaliation for the attorney filing with this Court. It will be a de facto disbarment. There is no prompt, post-taking final adjudication available for two to five years in the state system. The attorney has no record of any offense.

II.
Judgment Appealed

This is a Petition for a Writ of Certiorari to the California Supreme Court from an order dated February 5, 2002 from its delegatee summarily denying a stay. Said denial is attached as Exhibit A.

The Opinion on Review, Review Department, State Bar Court of the State Bar of California reversing the findings after the first trial for insufficiency of the evidence, changing the moral turpitude charge, finding guilt of it and remanding to find the facts in a second trial is attached as Exhibit B. It is hereinafter referred to as "the Opinion."

The Decision on Remand and Involuntary Inactive Enrollment Order of a State Bar employee is attached as Exhibit C. It is referred to as "Decision on Remand." The Petition for Interlocutory Review and Application for Stay

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[1]The Report of the Commission on Evaluation of Disciplinary Enforcement by the American Bar Association, 1992-mid -year meeting in Dallas, Texas.

filed with the California Supreme Court on February 6, 2002 is attached as Exhibit D. It is referred to as "the State Petition."

III.
Jurisdiction

Jurisdiction is founded on 28 U.S.C.A. Section 1257 as a petition from a decree of a State Supreme Court where the validity of a statute is drawn in question on the ground of its being repugnant to the Constitution of the United States, or where any right is specially set up or claimed under the Constitution of the United States.

Pursuant to Rule 10 of the Rules of the United States Supreme Court, subdivision (c) a state court has decided important questions of federal law in a way that conflicts with relevant decisions of this Court.

IV.
Constitutional and Statutory Provisions

Article I, section 10: No State shall ... pass any bill of attainder."

Fifth Amendment: No person shall be deprived of liberty or property, without due process of law."

Fourteenth Amendment: No State shall deprive any person of liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

California Business and Professions Code section 6106:

The commission of any act involving moral turpitude, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes cause for disbarment of suspension.

California Business and Professions Code section 6007 (c)(1)(4): "The board shall order the involuntary inactive enrollment of an attorney upon the filing of a recommendation of disbarment after hearing or default.[2]

V.
Statement of the Case

This is Alice saying, 'What is the charge?' to which the Queen responds, "First off with your head, then the verdict, then the trial, then the new charge and no evidence is required." See Carroll, Lewis, Alice in Wonderland and Through the Looking Glass, Harcourt, Brace, Chapters 11-12.

Kafka said it best. If you are acquitted, it isn't final. This would be followed by the second arrest, the second trial and acquittal, and then the third arrest, and so on. Finally if you object and insist on your innocence, you are executed. Kafka, Franz, The Trial, Schocken Books, 1998.

The attorney's thirty five year license to practice law was ex parte taken by a State Bar employee on December 20, 2001. He is a political appointee of the Democratic

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[2] California Business and Professions Code section 6086.5 provides that the defendant State Bar Court of the State Bar of California may act in place and instead of the Board.

Governor. This followed the second trial for the same offense. No evidence was presented at the second trial. Exhibit C.

The California Supreme Court has approved of a State Bar employee summarily taking an attorney's license with or without evidence. **Conway v. State Bar** 47 Cal. 3d 1107; 767 P.2d 657; 255 Cal. Rptr. 390; 80 A.L.R.4th 101 (1989). It has also ruled it shall not grant review to an attorney. An attorney's suspension or disbarment is not a cause. It requires no court review. **In re Rose** (2000) 22 Cal.4th 430, 93 Cal.Rptr.2d 298; 993 P.2d 956.[3] The California Supreme Court has placed no limitation on the act of moral turpitude statute. It has had one hundred and twenty four years to do so. It has refused. It includes any act or speech that is base. Exhibit B:19. [4]

A. Constitutional Issues Presented

The issues of constitutional import are the summary taking of a thirty five year license by a State Bar employee;

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[3] **Rose** maintains a mask that if issues are framed so as to fall within the ambit of "when it appears necessary to settle important questions of law, the State Bar is without or in excess of jurisdiction, no fair hearing, no support in the weight of the evidence, or discipline not appropriate," that the California Supreme Court may decide to grant review. California Rules of Court, Rule 954(a). Constitutional issues are not grounds for review. No accused's petition has been granted in over ten years as herein described.

[4] " Moral turpitude has long been defined as any act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow man, or to society in general, contrary to the accepted and customary rule of right and duty between man and man. (citation omitted). Exhibit B:19.

no prompt post-taking final adjudication; no requirement of notice, charges, evidence; barring defense; twice tried for the same offense; changing the charge after trial; no access to a court; and the unconstitutionality of the act of moral turpitude statute as applied to a punitive damage award and facially for over breadth. These issue were raised at the appropriate levels within the state system. Exhibit D.

B. The Civil Judgment

The attorney is an attorney at law for thirty-five years. He has no disciplinary record. He is a real estate broker for twenty-one years. One of his real estate companies offered trust deed investments. A person invested monies. She was not a client. The investment failed. A civil judgment was rendered. It was tried on a preponderance of the evidence burden of proof. Nine jurors found fraud. Three found no fraud. The jury instruction permitted a fraud finding based on a reckless statement. Exhibit B: 17-18, Exhibit D.

Legal malpractice was found. It was based on an instruction permitting a finding if a person asked for legal advice even if the attorney gave none. Punitive damages were imposed. They were based on a clear and convincing evidence burden of proof. They may be imposed if there is malice, oppression, or fraud. These terms include an act that is yucky. No specification of grounds was made. Exhibit B: 17-18, Exhibit D.18-19.

C. State Bar Proceedings

The State Bar brought attorney disciplinary charges. It did so based solely on the civil judgment. Exhibit B:1-3. Three charges remained: act of moral turpitude, business

transaction with a client, and failure to report the judgment within thirty days. The latter is uncontested. The attorney did not report the judgment to the State Bar within thirty days. The complainant, the investor, reported it. The case was on appeal. Exhibit B.

The moral turpitude charge is referred to as the "6106" charge. The business transaction charge is referred to as the"3-300" charge.

The moral turpitude charge was that, "Respondent knew or reasonably should have known that the facts concerning the aforesaid investment which he was concealing from James were material to her in making the investment decision and that she needed her funds returned to her in three or four months for investment into a condominium. By concealing from James, (sic) at the time she made the aforesaid investment, (sic) the true financial state of the asset into which she was investing her funds, Respondent engaged in an act of moral turpitude as set forth in Business and Professions Code section 6106." Exhibit D: 3, footnote 2.

1. The First Trial

The State Bar hires and pays its own judges. It is also the prosecuting party. It claims to have a Court. It is, however, barred from possessing judicial power. Exhibit B:26. As stated by this Court in **Keller v. State Bar of California** 496 U.S. 1 (1996) the "The State Bar is not a typical 'government agency.' The Bar's principal funding comes from dues levied on its members rather than from appropriations made by the legislature; its membership is composed solely of lawyers admitted to practice in the State; and its services by way of governance of the profession are essentially advisory in

nature, since the ultimate responsibility of such governance is reserved by state law to the State Supreme Court." It is barred from deciding constitutional issues. As stated in **Hirsh v. Justices of California Supreme Court** 67 F. 3d. 708 (Ninth Cir. 1995), at 708, "The California Constitution bars the Bar Court from considering federal constitutional claims."

The State Bar pays its investigators, prosecutors, and judges out of its private funds. Those include the sums they assess by finding guilt of each accused. They assess the salaries of their judges, prosecutors, and investigators on each accused. All attorneys have been found guilty. Exhibit B:26-27.

A hearing judge is assigned. A review may be requested to the review department of the State Bar. Exhibit B: 1.

The hearing judge denied the petitioner his right to defend, present evidence, cross-examine witnesses, or present any evidence. Collateral estoppel to the civil judgment was applied. Exhibit B: 2-3. The issues were different. The burden of proof was less for the civil trial than that required to find culpability in the attorney disciplinary proceeding. Exhibit B: 13-14. The prosecutor just put in the civil records. He rested on collateral estoppel. Exhibit B: 8. Culpability was found. A three-year suspension was recommended. Exhibit B:1.

2. Reversal after the First Trial

The State Bar's review department reversed the findings and conclusions.[5] The prosecutor had attempted to prove the

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[5] The review department opinion states that, "...[W]e must reverse the

charges by putting in the civil record. It reversed for an insufficiency of the evidence to support the moral turpitude and business transaction charges.[6] It voided the recommended suspension.

Instead of issuing an exoneration of the attorney, the State Bar's review department changed the moral turpitude

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hearing judge's findings regarding the nature and extent of respondent's section 6106 violation as well as the hearing judge's findings that respondent violated former rule 3-300." Exhibit B:5. It stated that "'W]e cannot exercise our authority to independently review and reweigh the evidence in the James lawsuit under the clear and convincing standard of proof and make our findings with respect to the charged rule 3-300 violations.. ...We... must reverse the hearing judge's factual findings and legal conclusions that respondent violated former rule 3-300 and remand for the matter for a new trial with respect to the charged 3-300 violations." Exhibit B:23.

[6]The opinion states that it is impossible to ascertain what facts support the moral turpitude and business transaction charges. Exhibit B: 8 and ft. 5: B:23. The opinion states that the State Bar prosecutor "attempted to establish the charged 3-300 business transaction with client) and section 6106 (moral turpitude) violations solely through the application of collateral estoppel without presenting any references to the record or analysis showing where and how each element of the charged violations were found by the jury in the James lawsuit by clear and convincing evidence." Exhibit B: 8. It states that, "We cannot determine the factual basis upon which the jury based its findings of malice, or oppression, or fraud, and whether it was based on fraud or breach of fiduciary duty. Nor can we determine the nature and extent of those acts by independently reviewing the record." Exhibit B:18. It states that "..[N]one of the elements of a former rule 3-300 (business transaction) violation are expressly addressed in the definitions given to the jury with respect to special finding 10 [the punitive damage instruction].... [T]he application of collateral estoppel does not establish that respondent violated former rule 3-300." Exhibit B: 23.

charge. It changed it from concealing material facts from an investor to a punitive damage award in a civil suit is ipso facto an act of moral turpitude. It found automatic guilt without notice or a trial.[7] It remanded to find the facts to support the guilt finding already made of its unnoticed moral turpitude charge and for a second trial on the business transaction charge even though it admitted that the prosecutor had failed to carry his burden of proof on either charge.[8]

The review department of the State Bar ruled that the petitioner was properly excluded from defending on a claim

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[7]The review department without notice after trial changed the moral turpitude charge to "We conclude that an attorney's guilt of malice, oppression, or fraud as those terms were defined for the jury in the James' lawsuit, with respect to any attorney's breach of fiduciary duty to either a client or a non-client involves moral turpitude in violation of section 6106 as a matter of law" The opinion states that, "We conclude that the commission of any of these acts involves moral turpitude in violation of section 6106." Exhibit B: 8. It states that, "However, under the circumstances and record in this proceeding, the application of those principles does not establish the nature and extent of those acts. Nor the application of those principles establish that respondent violated former rule 3-300." Exhibit B: 20.

[8] The remand order states, "Applying principles of collateral estoppel, we conclude that Bolden Bruce Kittrell is culpable of violating Business and Professions Code section 6106 .we order that this matter be remanded to the hearing department for a new trial on the following issues: (1) findings of fact surrounding respondent's violation of Business and Professions Code section 6106 (2) findings of fact and conclusion of law regarding the charged violations of rule 3-300 of the former Rules of Professional Conduct of the State Bar; (3) findings of fact and conclusions of law retarding aggravating and mitigating circumstances; (4) the appropriate level of discipline." Exhibit B: 28.

to collateral estoppel to the civil judgment. Exhibit B: 16.

The Opinion admits the attorney is entitled to be exonerated of both the moral turpitude and business transaction charges as the prosecutor failed in his burden of proof. Exhibit B.

To prevent a dismissal of the charges the Opinion finds culpability of moral turpitude by making up a brand new unnoticed charge claiming that any punitive damage award is *ipso facto* an act of moral turpitude. The prosecutor's failure to carry his burden of proof in the first trial entitles him to another trial against the accused where guilt of moral turpitude has already been made on a brand new charge just made up by the Review Department. Exhibit B.

3. The Second Trial

At the second trial no evidence was presented. Exhibit C: 3. The second State Bar hearing judge in his opinion stated that "The following findings of fact and conclusions of law are based on the evidence admitted at the prior hearing (sic- the first trial). No additional evidence was submitted at this hearing." Exhibit C:3.

The second hearing judge adopted the same findings which had already been rejected and reversed as insufficient evidence of culpability by the review department He stated that, "The court further concludes that the findings of fact and conclusions of law in the original hearing decision filed March 18, 1999, including the facts surrounding Respondent's violation of ... section 6106, should be and are fully adopted and therefore, are hereby set forth as follows: (thereafter follows the identical wording of the first hearing judge's findings which were already reversed

by the review department)." Exhibit C: 4.

The second hearing judge recommended disbarment with no evidence. He ex parte took the attorney's license to practice law the same day. Exhibit C.

4. Post-Taking Exhaustion of Remedies

The petitioner filed to void the ex parte taking. As it was patently unlawful, it was voided. The second hearing judge proposes taking the license again summarily on February 13, 2002. Exhibit D. The involuntary inactive enrollment statute authorizes him to summarily do so. Exhibit D. Motions for reconsideration, for a new trial, to recuse the judge from reviewing his own decision, to continue, to dismiss for unconstitutionality, to abate, and to stay the proceedings were filed. All have been summarily denied, except the motion to dismiss or to stay the proceeding. In the orders, the second hearing judge advises that the February 13, 2002 hearing shall take place before him. The review department has not acted on a stay request. The California Supreme Court has not acted on the Petition for Review and the Stay request. Exhibit D.

VI.
A Summary Suspension by a State Bar Employee is Unconstitutional

The involuntary inactive enrollment statute authorizes a State Bar employee to summarily take a license. The taking follows automatically from his recommendation of disbarment. California Business and Professions Code 6007 (c)(4).

The prior statute that is at issue authorizes the summary taking without a hearing or evidence on the basis that the recommendation of disbarment creates a rebuttable presumption that the attorney has caused or is causing substantial harm to the attorney's clients or the public, the attorney's clients or the public are likely to suffer injury from the denial of the taking of the license or there is a reasonable likelihood that the harm will reoccur or continue, and there is a reasonable probability that the State Bar will prevail on the merits of the underlying disciplinary matter. California Business and Professions Code former section 6007 (c)(2)[9]

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[9] Former section 6007(c)(1) states, "The Board may order the involuntary inactive enrollment of an attorney upon a finding that the attorney's conduct poses a substantial threat of harm to the interests of the attorney's clients or to the public." The threat of harm requirement mandates that three findings be made: (A) The attorney has caused or is causing substantial harm to the interests of the attorney's clients or to the public, (B)(1) The attorney's clients or the public are likely to suffer greater injury from the denial (of the order) than the attorney is likely to suffer if it is granted, or B) there is a reasonable likelihood that the harm will reoccur or continue, and C) There is a reasonable probability that the State Bar will prevail on the merits of the underlying matter." A recommendation of disbarment creates a rebuttable presumption that the factors are established. The presumption is one affecting the burden of proof as defined in Section 605 of the Evidence Code. The statute also provides that, "Where the evidence establishes a pattern of behavior, including acts likely to cause substantial harm, the burden of proof shall shift to the attorney to show that there is no reasonable likelihood that the harm will reoccur or continue."

A. Bill of Attainder

Is not the involuntary inactive enrollment statute a prohibited bill of attainder? It is a legislative act. It takes the property and the liberty of an attorney and his right to earn a living. It does so without a judicial trial. It targets a select group. It targets California attorneys. It selects them on the basis that a State Bar employee, with or without evidence, recommends disbarment.

Article I, section 10 of the United States Constitution states that, "No State shall ... pass any bill of attainder." A bill of attainder is " a legislative act which inflicts punishment without a judicial trial." See **Cummings v. State of Missouri** 71 U.S. 277 (1866). Such "legislative acts...that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution." **United States v. Lovett** 328 U.S. 303, at 315, 90 L.Ed. 1252, 1259, 60 S.Ct. 1073. The taking of a license to practice law is a punishment. **Ex Parte Garland** 4 Wall. 333, 379. As held in **In re: Ruffalo,** at 550, "Disbarment, designed to protect the public, is a punishment or penalty imposed on a lawyer...."

Is not the legislative act targeting California attorneys to have their licenses taken without a judicial trial and summarily by a State Bar employee who recommends disbarment an unconstitutional bill of attainder?

B. No Post-Taking Prompt Final Adjudication

This Court has held that an emergency suspension requires that there be a prompt, post-taking final

adjudication in order to satisfy the demands of due process of law. **Barry v. Barchi** (1979) 443 U.S. 55, 61 L.Ed.2d 365, 99 S.Ct. 2642. See also **Gershenfeld v. Justices of Supreme Court of Pa.** (E.D.Pa. 1986) 641 F. Supp. 1419, **In re Malvin** 466 A.2d at 1223; **In re Ellis** 680 N.E.2d 1154, **Matter of Kenney** (1987) 399 Mass. 431, 504 N.E.2d. 652.

As held in **Conway**, in Justice Kaufman's dissent, at 1135, "Absent the requirement of a reasonably prompt postdeprivation notice of formal disciplinary charges, I would hold that section 6007, subdivision (c) violates due process. He stated, **Conway,** at 1134, "The Failure to Require a Prompt Disciplinary Hearing Constitutes a Violation of Due Process. Even assuming, arguendo, that the bar could constitutionally impose a temporary suspension pursuant to section 6007, subdivision (c), the absence of a statutory requirement that the bar also provide, within a *reasonably prompt* period of time, a full and final determination of the underlying disciplinary matter, renders the statute constitutionally suspect on its face. Indeed, the majority opinion concedes, in light of the `[reduced]' time an attorney has to meet the charges against him and the fact that he enjoys `fewer rights' than attorneys facing adverse action under other statutes, `that a final disposition is required *at some point* to validate the procedures governing the predeprivation hearing.' n7 (Maj. opn. at p. 1121, italics added.) In my view, however, such an amorphous time requirement is totally inadequate to protect the interests of a member placed on involuntary inactive enrollment pursuant to the expedited procedures of section 6007, subdivision (c)."

The delay in all cases has been a minimum of two years. It is now approaching five years from the time of an inactive order and a final state adjudication In every case the delay has never been prompt. C.f. **Lebbos v. State Bar** (1991) 278 Cal. Rptr. 845, cert. denied 116 L. Ed. 2d. 289, (twenty-five months), **Jones v. State Bar** (1989) 261 Cal. Rptr. 397 (three years), **Coombs v. State Bar** (1989) 262 Cal. Rptr. 554 (two years nine months), **Cannon v. State Bar** (1989) 275 Cal. Rptr. 433 (over two years), and now pending for four years and continuing in **In the Matter of Phillips** (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 47, 49. There are no expedited procedures. Involuntary inactive enrollment orders are de facto disbarments. The State Bar deliberately delays processing these cases so that the attorney is rendered impotent to seek court access or review. Since the reality is that there is and has never been any prompt, post-taking final determination, is not the involuntary inactive enrollment statute unconstitutional?

C. A Taking of a License with No Evidence

The second hearing judge admitted there was no evidence presented. Exhibit C. He ex parte took the attorney's thirty-five year license to practice law the same day. Exhibit C. He shall do so again. The statute allows this. The taking flows from the recommendation of disbarment, not from evidence. Is not the taking of a license with no evidence a violation of due process of law? C.f. **Taylor v. Louisiana** 370 U.S. 154 (1962), **Johnson v. Florida** 391 U.S. 596 (1968), **Thompson v. Louisville** 362 U.S. 199.

D. No Success or Exigency Requirements

This Court has held that an attorney may not be deprived of his license to practice law for reasons that contravene the due process and equal protection clauses. This Court has held in **Willner v. Committee on Character** 373 U.S. 96 (1963), at 102, "...[T]he requirements of ...due process must be met before a State can exclude a person from practicing law." C.f. **In re: Ruffalo, Schware v. Board of Examiners** (1957) 353 U.S. 232, 77 S. Ct. 752, 1 L. Ed. 2d. 796, and **Spevack v. Klein**, 385 U.S. 511, 515. The involuntary inactive enrollment statute provides for no hearing, evidence, or exigency.

Emergency suspensions of attorney's licenses in other jurisdictions are based on the requirements for issuance of a preliminary injunction. The entity doing the taking is the licensing constitutional court. Those jurisdictions, unlike California, have ABA approved professional responsibility rules. Moral turpitude has been rejected as a cause for discipline in all other jurisdictions within the United States due to its vagueness. Only California still retains it. Section 6106. Exhibit D.

For a preliminary injunction to issue a party must show probable success on the merits and the possibility of irreparable injury. **Metro Pub. Ltd. v. San Jose Mercury News**, 987 F.2d 637,639 (9th Cir. 1993); F.R. C.P. 65. When the standards of a preliminary injunction are not complied with and a showing is not made of a high probability of success on the merits and of irreparable, imminent, and severe actual harm if it does not issue, the emergency suspension is not warranted. **In the Matter of Russakoff** 79 N.Y.2d 520, 593 N.E.2d 1357, 583 N.Y.S.2d 949(1992), **In the Matter of Trujillo,** 2001 UT 38, **People v. Varallo**, 913 P.2d 1, 6 (Colo. 1996) (en banc) ("Immediate, temporary, or interim suspensions have the same effect as preliminary injunctions."), cert. denied, 519 U.S. 822 (1996**); In re Malvin**, 466 A.2d 1220, 1223 (D.C. 1983) (noting that "[t]he temporary suspension of an attorney pending the completion of disciplinary proceedings has the same effect as a preliminary injunction barring that attorney from the practice of law"), **In re Malvin,** 466 A.2d at 1223; **In re Ellis**, 680 N.E.2d 1154, 1160 (Mass. 1997); see also Francis M. Dougherty, Annotation, "Validity and construction of procedures to temporarily suspend attorney from practice, or place attorney on inactive status, pending investigation of, and action upon, disciplinary charges, 80 A.L.R.4th 136, 154 n.6 (1990) (stating that a "number of courts" have adopted the District of Columbia Court of Appeals' analysis in **In re Malvin**, applying the standard for issuing preliminary injunctions in determining whether an attorney should be temporarily suspended from the practice of law, pending final disposition of disciplinary proceedings.)

The involuntary inactive enrollment statute does not have the requirements for an emergency suspension. There is no irreparable, imminent, or severe harm required. A threat suffices. The threat is of an unspecified harm. The threat is to interests rather than persons. The threat to interests may be to any claimed "public" interest. California's standard of "a substantial threat of harm to the interests of the public or the attorney's clients," is vague, subjective, and ephemeral. It fails to have a required exigent standard justifying denial of the attorney's due process rights to constitutional review and action by his licensing court before his license may be taken.

The fact that "substantial harm" is substituted for the requirement of irreparable harm indicates that no emergency justifies the emergency suspension. The second finding that the public or clients are likely to suffer injury does not require a finding of actual irreparable harm to anyone. The third finding is that there is a reasonable probability that the State Bar will prevail on the merits of the underlying disciplinary matter. There is no required finding that there is a likelihood of success on the merits. Ephemeral probabilities are substituted for the requirement of actual fact of success on the merits. There is always a probability that some violation may be found. Such a probability does not establish exigent circumstances justifying an emergency suspension.

Since this case involves one investor and one civil judgment in a thirty-five year career, there is no possibility of a finding of any harm to the attorney's clients or to the public. No client or public is involved. There is no possibility of a finding that the attorney's clients or the public are likely to suffer injury if the taking of the

attorney's license is not granted. There are no clients or the public involved.

There is no possibility of a finding that the State Bar has probability of success on the merits. It presented no evidence.

For lack of compliance with the substantive requirements for an emergency suspension, is not California's involuntary inactive enrollment statute unconstitutional for denial of substantive due process of law both facially and as applied ?

E. No Court Access, Action, or Review

Licensing of a Court officer would appear to require a Court. The involuntary inactive enrollment statute has no Court. **Cummings, Ex Parte Garland.** The taking is summary by a State Bar employee, finality is two to five years away, and the California Supreme Court has now indicated it shall not grant review to accused attorneys. **In re Rose** (2000) 22 Cal.4th 430, 93 Cal.Rptr.2d 298; 993 P.2d 956.

Is not the statute unconstitutional as the unlawful delegation of judicial power to a private person? Is it not a standardless sweep with no rights to due process of law? Is not "[t]he delegation …so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this court which foreclose the question?" **Schechter Poultry Corp. v. United States**, 295 U.S. 495, at 537, 55 S.Ct. 837, 97 A.L.R. 947. See **Eubank v. Richmond**, 226 U.S. 137, 143, 33 S.Ct. 76, 42 L.R.A.(N.S.) 1123; **Washington ex rel. Seattle Trust Co.**

v. Roberge 278 U.S. 116, 121, 122 S., 49 S.Ct. 50, 86 A.L.R. 654. C.f. **In re Ruffalo, Schware, Spevack.** [10]

Since the State Bar and its Court are constitutionally prohibited from deciding constitutional issues, **Hirsh,** does not the taking offend due process of law by denying to an accused his right to have his constitutional issues decided by a competent tribunal prior to the taking? Since the California Supreme Court has held that the suspension or disbarment of an attorney is not a cause requiring its review,

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[10] Justice Kaufman, in dissent in **Conway**, dealt with this unlawful delegation of judicial power issue that the majority claimed was not at issue. He stated, **Conway** at footnote 4, that "The majority errs in concluding that our decisions permit the bar to impose a *temporary* disciplinary suspension, so long as such discipline is not "final" and is subject to "review." (Maj. opn. at p. 1120, fn. 7.) The issue is *power*, not timing. The cases unequivocally hold that only the courts may impose a disciplinary suspension or disbarment. " He stated that, "It is plain that the proceedings of the bar in this matter cannot withstand constitutional scrutiny....[O]nly the courts may suspend an attorney for disciplinary purposes. (**Saleeby v. State Bar, supra** 39 Cal.3d at p. 557; **Hustedt v. Workers' Comp. Appeals Bd., supra,**30 Cal.3d at pp. 336-337, 339; **Brotsky v. State Bar, supra,**57 Cal.2d at pp. 300-301; **In re Shattuck, supra** 209 Cal. at p. 12.) The Legislature may delegate to the bar, as an administrative arm of the courts, the authority to investigate and to make recommendations in such matters; it may not, however, delegate the inherent judicial prerogative to discipline by means of disbarment or suspension. (**Hustedt** ...at 339; **Brotsky**... at 300-301. Though styled an "inactive enrollment," the effect of the referee's order is clearly that of a "temporary" disciplinary suspension. **Hence, the provisions of section 6007 subdivision (c) which permit the bar to order the involuntary inactive enrollment of an attorney are patently unconstitutional. (emphasis added).**"

is not the absence of a court to decide any issues pre or post-taking a denial of due process of law? **In re: Rose.**

F. Disparate Treatment of Some Lawyers

Justice Kaufman in dissent in **Conway** at 1137 stated the involuntary inactive enrollment statute was unconstitutional as a denial of equal protection of the laws.[11] Is not the

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[11] Justice Kaufman stated, **Conway,** at 1137, the following: "*Petitioner Was Denied Equal Protection of the Law.*"Aside from the...due process infirmities apparent from the face of the statute, it is also clear that petitioner was denied equal protection of the law under section 6007, subdivision (c) as applied....It is well settled that the state 'cannot...arbitrarily foreclose to any person the right to pursue an otherwise lawful occupation.' (**Purdy & Fitzpatrick v. State of California** (1969) 71 Cal.2d 566, 579...(citation omitted). There is nothing in the statute or the record to justify the bar's disparate treatment of petitioner. `Action is arbitrary not only when it is capricious, but also if it lacks adequate support in the record, when the facts do not justify the conclusion.' (citation omitted)...The record and the statute in question yield absolutely no rational basis for the bar's decision to proceed against petitioner under the provisions of subdivision (c) rather than the more directly applicable provisions of subdivision (b). The only plausible reason for singling out petitioner was the fact that the bar was put to far less inconvenience under the relaxed notice, discovery and evidentiary rules of subdivision (c). That, in my estimation, does not constitute a legitimate basis of distinction....Though the majority purports to find `no lack of justification for the different procedures" under subdivisions (b) and (c) of section 6007 (maj. opn. at p. 1117), in point of fact the only justifications they offer are baseless. There was no legitimate reason to deny petitioner in this matter the full range of procedural protections otherwise accorded members of the bar under section 6007, subdivision (b). For this reason, I would hold that section 6007, subdivision (c) is invalid as applied."

singling out of an attorney who has one State Bar employee recommend disbarment the creation of a "classification [which] rests on grounds wholly irrelevant to the achievement of the State's objective," **McGowan v. Maryland**, 366 U.S. 420, 425 (1961)? Is not that demarcation line lacking in "some relevance to the purpose for which the classification is made?" **Baxstrom v. Herold** 383 U.S. 107, 111.

G. A Judge in his Own Cause

The hearing judge who recommends the disbarment then decides if he is right and then takes the license summarily. He reviews his own decision. Is this not the lack of a fair and impartial adjudicator as required for due process of law? C.f. **In re: Murchison** 349 U.S. 133, 136, 75 S. Ct. 623, 655, 99 L. Ed. 942; **Aetna Life Insurance Co. v. Lavoie** 475 U.S. 813 (1986); and **Liljeberg v. Health Services Acquisition Corp**. 486 U.S. 847 (1988).

VII.
The Prosecutor Failing in His Burden of Proof in Two Trials Requires Reversal and Dismissal

Attorney disciplinary proceedings are quasi-criminal in nature. When the prosecutor, after trial, fails to carry his burden of proof of the noticed charge, dismissal is required. **In re Ruffalo** (1968) 390 U.S. 544, 88 S. Ct. 1222, 20 L. Ed. 117.

In the first trial the prosecutor failed to present sufficient evidence. In the second he presented none. Did not due process of law require a dismissal and not remand for a new and second trial? Are not the principles of **Arizona v.**

Washington (1978) 434 U.S. 497, 503-505 wherein was stated that, "[T]he prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial," applicable to a quasi-criminal attorney disciplinary proceeding?

VIII.

Is not a Guilt Finding of an Unnoticed Charge A Denial of Due Process of Law?

This Court has held that an attorney is entitled to procedural due process, "which includes fair notice of the charge." **In re: Ruffalo.** This Court stated in **In re Ruffalo** at 546-547, " the charge for which the petitioner stands disbarred was not in the original charges against him. It was only after he and [the agent] testified that this additional charge was added. Thereafter, no additional evidence against petitioner was taken " This Court's conclusion was that "The charge must be known before the proceedings commenced. This absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprived petitioner of procedural due process." **In re Ruffalo** at 552.

When the review department after trial changed the moral turpitude charge from concealing material facts from an investor to a punitive damage award is ipso facto an act of moral turpitude, a summary order of reversal and of dismissal should issue by this Court to compel compliance with the decisions of this Court. Such changing of charges when there is an admission of insufficiency of the evidence to support the charges are serious violations of due process of law.

IX.

May An Attorney Be Barred From Defending by Applying Collateral Estoppel to a Civil Damage Award?

In two trials the attorney has been barred from defending. This Court has held that collateral estoppel requires that, "The matter raised in the second suit must be identical in all respects to that decided in the first proceeding and where the controlling facts and applicable legal rules remain unchanged," **Tait v. Western Md. R. Co.** 289 U.S. 620 (1933). An act of moral turpitude was never presented to the civil jury. Punitive damages may be imposed for something that is yucky. The application of collateral estoppel to bar defense to an accused in an attorney disciplinary proceeding based on indefinite damage findings in a civil trial offends due process of law. Should not a summary reversal and dismissal issue when the Opinion claims that collateral estoppel applies as a punitive damage award is an issue in common with the merits of moral turpitude charge in an attorney disciplinary proceeding? Exhibit B.

X.

Is not Moral Turpitude Over broad and Vague as Applied?

The American Bar Association deleted act of moral turpitude as a cause for attorney discipline for over breadth

and vagueness.[12] There is no case holding that l punitive damages are an act of moral turpitude. The decision in this case is the first such claim. The review department relied on criminal conviction and theft cases to claim that a civil punitive damage award is an act of moral turpitude. Exhibit B: 20. There is no core to the term. There are over one hundred meanings possible for malice, fraud, or oppression. The term "act of moral turpitude" may be used to apply to solely speech and is ambiguous and vague. Is not the term unconstitutional for over breadth and vagueness as applied to a punitive damage award? Exhibit B:22, Exhibit D: 21-22.

XI.
The Taking of This Attorney's License is a Vindictive Sentencing

The first judge recommended a suspension. The review department reversed for insufficiency of the evidence. The second judge stated that no evidence was presented. He then recommends disbarment, ex parte takes the attorney's license to practice law, and now proposes doing it again. Is this not a prohibited vindictive sentencing in violation of **North Carolina v. Pearce** 395 U.S. 711 (1969)?

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[12] The American Bar Association stated, "[T]he Model Rules also eliminate the troublesome 'moral turpitude' standard. This standard has been broadly defined as 'an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow men, or to society in general, contrary to the accepted and customary rule of right and duty between man and man.' That the standard was manifestly ambiguous is evidenced by the wide ranging interpretations given it by the courts." A.B.A. Annotated Model Rules, Rule 8.4, Misconduct, Comment, at 353.

Conclusion

The attorney for thirty-five years with no prior record has been subject to two trials where he was barred from defending himself. The appellate level changed the charge, found guilt of its new charge, remanded. At a second trial no evidence was presented. The State Bar employee recommended disbarment. He took the lawyer's license ex parte. He shall do it again. Should not a summary reversal and dismissal issue?

Respectfully Submitted,

Dated: February 7, 2002

B. BRUCE KITTRELL
Petitioner Attorney ***Pro Se***

UNITED STATES SUPREME COURT

In the Matter of

B. Bruce Kittrell

No. 40896

A Member of the State Bar

Appendix to Petition for a Writ of

Certiorari to the California Supreme Court

B. BRUCE KITTRELL
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Petitioner Attorney ***Pro Se***

SUPREME COURT
FILED
Feb 11, 2002
Frederick K. Ohlrich
Clerk Deputy

S104191
State Bar Nos 95-0-14321/02-TE-10059

IN THE SUPREME COURT

OF CALIFORNIA

En Banc

In the Matter of the BOLDEN B. KITTRELL

Application for stay and petition for writ of review DENIED.

GEORGE X
Chief Justice

On February 1, 2002, Respondent Bolden Bruce Kittrell ("Respondent") filed a Motion for Stay of Involuntary Inactive Proceeding ("motion"), which is presently set for hearing on February 13, 2002, pending disposition of Respondent's Petition for Interlocutory Review by the Review Department of the State Bar Court which accompanied Respondent's motion.

After reviewing and considering said motion, the Court finds no good cause to grant a stay of the hearing date set in the involuntary inactive enrollment proceeding (Case No. 02-TE-10059-RMT). Respondent's motion is therefore **DENIED.** It is ordered that the hearing in Case No. 02-TE-10059-RMT remains as set for February 13, 2002, and Respondent shall be prepared at the time of the hearing on February 13, 2002, to present evidence to rebut the presumption that he has caused or is causing substantial harm to the public or his clients, and that the public or Respondent's clients are likely to suffer greater injury if the involuntary inactive enrollment is denied than Respondent is likely to suffer if it is granted or there is a reasonable likelihood that the harm will continue or reoccur.

IT IS SO ORDERED.

Dated: February 7, 2002

s/_____
ROBERT M. TALCOTT
Judge of the State Bar Court

PUBLIC MATTER – DESIGNATED FOR PUBLICATION

Filed Oct 26, 2000
State Bar Court
Clerk's Office
Los Angeles

REVIEW DEPARTMENT OF THE STATE BAR COURT

In the Matter of	Case No. 95-0-14321
BOLDEN BRUCE KITTRELL	OPINION ON REVIEW
A Member of the State Bar	

Both respondent Bolden Bruce Kittrell[1] (respondent) and the State Bar, represented by its Office of the Chief Trial Counsel (OCTC), seek review of a hearing judge's recommendation that respondent be suspended from the practice of law for five years, that the suspension be stayed, and that respondent be placed on probation for four years on conditions including that respondent be actually suspended for three years and until he establishes his rehabilitation, present fitness to practice, and present learning in the law. The hearing judge's discipline recommendation is based upon his findings that, with respect to a business transaction with a 59-year-old woman of limited means, respondent committed three violations of the former Rules of Professional Conduct of the State Bar

[1] Respondent was admitted to the practice of law in the State of California in December 1967 and has been a member of the State Bar since that time.

that were effective from May 27, 1989 through September 13, 1992[2] and two violations of the Business and Professions Code.[3]

More specifically, the hearing judge found that, with respect to a business a transaction with Ms. Czarine Hope James (James), respondent committed two violations of former rule 3-300(A): first by entering into an unfair business transaction with James and second by entering into that transaction without disclosing the terms of the transaction to James in writing. The hearing judge also found that respondent violated former rule 3-300(B) by failing to inform James in writing that she could seek independent legal advice with respect to the transaction. Next, the hearing judge found that respondent violated section 6106 by engaging in acts of concealment and deception amounting to moral turpitude with respect to respondent's dealings with James. Finally, the hearing judge found that respondent violated section 6068, subdivision (o)(2) by failing to report, to the State Bar, the entry of a civil judgment against him for, among other things, fraud and breach of fiduciary duty with respect to the James business transaction.[4]

In making his findings that respondent violated former rule 3-300 and section 6106, the hearing judge applied

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[2] Unless otherwise indicated, all future references to former rules are to these former rules.

[3] Unless otherwise indicated, all future references to sections are to sections of the Business and Professions Code.

[4] OCTC also charged respondent with violating section 6068, subdivision (o)(1), which requires attorneys to report, to the State Bar, the filing of three or more lawsuits against them for legal malpractice in a twelve-month period. However, the hearing judge found that OCTC failed to establish such a violation. We agree, and accordingly, adopt that finding, but also dismiss the charge with prejudice (Rules Proc. Of State Bar, title II, State Bar Court Proceedings, rule 261(a)).

principles of collateral estoppel to bind respondent to the adverse civil judgment that James obtained against respondent in the Orange County Superior Court after an eight-day jury trial (the James lawsuit). The hearing judge applied those principles to preclude respondent, in this disciplinary proceeding, from relitigating the jury's findings in the James lawsuit that respondent defrauded and breached his fiduciary duty to James. Moreover, in addition to applying principles of collateral estoppel in this proceeding, the hearing judge also bound respondent to and relied upon the evidentiary record in the James lawsuit to find, at least, the former rule 3-300 violations, the nature and extent of the section 6106 violation, and various aggravating circumstances. The hearing judge bound respondent to and relied upon the civil record without giving respondent an opportunity to attempt to contradict, temper, or explain the adverse evidence in that record. In addition, on the basis that respondent was bound to the civil record, the hearing judge precluded respondent form fully cross-examining OCTC's witnesses during the discipline phases of the trial and from fully presenting his (i.e., respondent's) mitigation evidence.

Respondent raises numerous contentions challenging the propriety of the disciplinary trial and attaching the hearing judge's decision and discipline recommendation. We summarize respondent's contentions into the following categories. First, respondent contends that it is inappropriate to apply, in this disciplinary proceeding, principles of collateral estoppel with respect to the judgment in the James lawsuit. Next, respondent contents that even if those principles can be appropriately applied in this proceeding, their application neither establishes that he violated former rule 3-300 and section 6106 nor justifies the hearing judge's action in binding him to the evidentiary

record in the James lawsuit. Then, respondent contends that the hearing judge erred in precluding respondent from fully cross-examining OCTC's witnesses during the discipline phase of the trial and from fully presenting his mitigation evidence. Finally, respondent contends that he was denied due process because the hearing judge was not impartial since his judicial salary is paid by the State Bar.

On review OCTC asserts that all of respondent's contentions are meritless. In addition, it asserts that the hearing judge erred in not recommending respondent's disbarment.

After independently reviewing the record (Cal. Rules of Court, rule 951.5; Rules Proc. of State Bar, title II, State Bar Court Proceedings, rule 305(a); *In re Morse* (1995) 11 Cal.4th 184, 207), we conclude that principles of collateral estoppel can properly be applied in this proceeding and that their application establishes that respondent engaged in acts of moral turpitude in violation of section 6106. However, under the circumstances and record in this proceeding, the application of those principles does not establish the nature and extent of those acts. Nor does the application of those principles establish that respondent violated former rule 3-300.

Moreover, we agree with respondent's contentions that the hearing judge erred in binding respondent to and relying upon the evidentiary record in the James lawsuit to make, at a minimum, his findings regarding the nature and extent of the found former rule 3-300 and section 6106 violations and various aggravating circumstances without giving respondent an opportunity to contradict, temper, or explain the evidence in that civil record. We also agree with respondent's contentions that the hearing judge erred in precluding respondent from fully cross-examining OCTC's witnesses during the discipline phase of the trial

and in precluding respondent from fully presenting his mitigating evidence. On the other hand, we reject respondent's contention challenging the impartiality of the hearing judge.

Because the application of collateral estoppel principles neither establishes the nature and extent of respondent's acts of moral turpitude in violation of section 6106 nor the former rule 3-300 violations found by the hearing judge and because the hearing judge erred in binding respondent to the evidentiary record in the James lawsuit without giving respondent an opportunity to attempt to contract, temper, or explain that evidence, we must reverse the hearing judge's findings regarding the nature and extent of respondent's section 6106 violation as well as the hearing judge's findings that respondent violated former rule 3-300. Moreover, because the hearing judge erred in precluding respondent from fully cross-examining OCTC's witnesses during the discipline phase of the trail and from fully presenting his mitigating evidence, we must reverse the hearing judge's aggravation and mitigation findings.

Notwithstanding the foregoing reversals, we adopt the hearing judge's factual findings and legal conclusion that respondent violated section 6068, subdivision (o)(2).

Because we reverse most of the hearing judge's findings, we must also vacate his discipline recommendation and remand this matter for a new trial on all issues except the issues of respondent's culpability for violating section 6106, which we hold has been established under principles of collateral estoppel, and for violating section 6068, subdivision (o)(2), which we hold has been established by clear and convincing evidence independent of the application of collateral estoppel. Finally, in light of our order vacating the hearing judge's discipline recommendation and remanding the matter for further

proceedings, OCTC's contention that the hearing judge erred in not recommending that respondent be disbarred is moot and, therefore, not addressed.

I. Preliminary Factual Matters and Procedural History

In December 1991 James gave respondent $61,000 for investment purposes. One investment was in the amount of $7,000; the other investment was in the amount of $54,000. The disciplinary charges against respondent deal only with the $54,000 investment. The $54,000 investment was in a loan secured by a deed of trust on real property used as a dance studio in Studio City, California. That loan went into default and the deed of trust that was to secure it was extinguished by a superior trust deed. Accordingly, James lost all of her $54,000 investment and, as noted above, sued respondent.

James filed her lawsuit in 1993 and sued not only respondent, but also respondent's law partners and others. She sued them for, among other things, violating California and federal securities laws, legal malpractice, fraud, and breach of fiduciary duty. After trial in July 1994, the jury found respondent liable to James on each of James's causes of actions. The jury found, by a preponderance of the evidence, that respondent breached his fiduciary duties to James, that respondent defrauded James, and that, as a result of each of these wrongful acts, James incurred actual damages. The jury additionally found, by clear and convincing evidence, that respondent was guilty of oppression, malice, or fraud with respect to his breach of fiduciary duty or fraud.

Judgment was ultimately entered for James on her breach of fiduciary duty claim because it was the claim on which the jury awarded the most damages. In addition, because the jury found that respondent was guilty of oppression, malice, or fraud by clear and convincing evidence,

judgment was also entered for James on her claim for punitive damages. (Civ.Code, section 3294 [under 1987 amendments to this statute, punitive damages may be recovered in cases involving the breach of an obligation not arising in contract when it is proved by clear and convincing evidence that the defendant is guilty of oppression, malice, or fraud].) The jury awarded James $180,800 on her breach of fiduciary duty claim and $61,200 on her claim for punitive damages. After these two awards totaling $242,000 were increased to include prejudgment interest and reduced to give respondent credit of the settlement proceeds James received from respondent's law partners, a final judgment in the amount of $217,235.10 plus an additional $4,281.31 in costs was entered against respondent and in favor of James.

Respondent appealed the judgment on the sole ground that the evidence was insufficient to support the jury's findings. The court of appeal disagreed and affirmed the judgment. Thereafter, the California Supreme Court rejected respondent's request to file an untimely petition for review. Similarly, the United States Supreme Court denied respondent's application for an extension of time to file a petition for a writ of certiorari. At that time, the judgment became final.

In July 1997 OCTC filed a motion in limine in the hearing department. In that motion OCTC sought an order precluding respondent from relitigating those issues that were previously litigated and found against him by clear and convincing evidence in the James lawsuit. The hearing judge granted OCTC's motion. Respondent sought interlocutory review of the hearing judge's order. We denied that petition because no abuse of discretion or error of law was shown. In our order denying respondent's petition, we specifically pointed out that collateral estoppel

applies only to those issues that the jury in the James lawsuit found by clear and convincing evidence.

Thereafter, in April 1998, the hearing judge filed an order clarifying how the principles of collateral estoppel would be applied in this disciplinary proceeding. In his clarification order, the hearing judge correctly pointed out to the parties that the application of principles of collateral estoppel with respect to prior civil findings does not modify the fundamental requirement that, to establish a disciplinary violation, OCTC must prove each element of a charged violation by clear and convincing evidence. Thus, as the hearing judge correctly noted, the application of collateral estoppel will establish an element of a charged disciplinary violation only if that same element was previously found by the jury in the James lawsuit by clear and convincing evidence. As the hearing judge also correctly noted, if an element of a charged violation was not previously found by the jury by clear and convincing evidence, OCTC would be required to establish that element in this proceeding with clear and convincing evidence independent of the principles of collateral estoppel.

Notwithstanding the admonitions in our order denying respondent's petition for interlocutory review and the hearing judge's clarification order regarding the principles of collateral estoppel in this proceeding, OCTC attempted to establish the charged former rule 3-300 and section 6106 violations solely through the application of principles of collateral estoppel without presenting any references to the record or analysis showing where and how each element of the charged violation were found by the jury in the James lawsuit by clear and convincing evidence.[5] Instead, OCTC

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[5] OCTC did file, in the hearing department, two pleadings containing summaries and references to portions of the testimony and some of the exhibits in the James lawsuit. However, those references were only to

left it to the hearing judge to glean through the voluminous documents that it introduced into evidence and determine whether each element of the charged violations were found by the jury by clear and convincing evidence.

The voluminous documents OCTC introduced into evidence included copies of (1) the superior court's file in the James lawsuit (including the jury instructions and special verdicts, the judgment, the transcript of the trial, and the exhibits); (2) the court of appeal's opinion in the James lawsuit, and its order denying respondent's petition for rehearing; (3) a letter from the California Supreme Court refusing respondent's request for permission to late file a petition for review of the James lawsuit judgment; and (4) a letter from the United States Supreme Court denying respondent's request for an extension of time to file a petition for a writ of certiorari for review of the James lawsuit judgment.

After it introduced the foregoing documents, OCTC presented the testimony of a State Bar attorney with respect to the charged section 6068, subdivision (o)(2) violation. That attorney testified that respondent did not report, to the State Bar, the entry of the civil judgment against him the James lawsuit. Respondent cross-examined that witness, and OCTC then rested.

Respondent was then permitted to make an opening statement and to call one witness to testify. That witness is a former owner of the dance studio property that was to have been the collateral (under a third deed of trust) securing James's $54,000 investment/loan. That witness testified as to the improvements he made to the dance

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various portions of the civil record that OCTC believed to be of particular importance or relevance in this proceeding and not to the record references needed for the proper application of collateral estoppel .

studio and the studio's fair market value. When respondent attempted to testify in his own defense and to present exculpatory evidence as to the adverse jury findings, OCTC objected. The hearing judge sustained OCTC's objection and precluded respondent from presenting any other evidence with respect to the former rule 3-300 and section 6106 violations on the ground that he had previously granted OCTC's motion in limine to preclude respondent, under principles of collateral estoppel, from "retrying" the James lawsuit in this disciplinary proceeding.

The hearing judge gave the parties permission to file written closing statements and briefs on the issue of culpability. Thereafter, the hearing judge made tentative findings that respondent was culpable of misconduct, but did not specify the charges on which he found respondent culpable.[6] The hearing judge then scheduled a date for the disciplinary portion of the trial to begin.

During the disciplinary portion of the trial, OCTC presented its aggravating evidence first. OCTC had James testify as to the significant harm she suffered from respondent's misconduct. (Rule Proc. of State Bar, Title IV, Stds. For Atty. Sanctions for Prof. Misconduct (standards), std. 1.2(b)(iv) [harm aggravation].) OCTC also had James testify as to respondent's alleged misrepresentations to her regarding the terms of the transaction/loan and when he would return her $54,000 investment/loan to her. (Std. 1.2(b)(iii) [misconduct surrounded by dishonesty or bad

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[6] Respondent argues at some length that the hearing judge's failure to specify his culpability findings before the discipline phase of the trial prevented respondent from being able to adequately prepare for the discipline phase of the trial. Because we reverse the hearing judge's findings as to aggravating and mitigating circumstances and remand for a new trial on those issues, respondent's contention is moot and, therefore, not addressed.

faith aggravation].) The hearing judge precluded respondent from fully cross-examining James on the stated basis that he was not going to permit respondent to go into the facts of or retry the James lawsuit in the discipline phase of the trial.

OCTC also presented the testimony of Evan Borges, who was James's attorney in the James lawsuit. Attorney Borges testified that respondent lacks remorse over and an adequate understanding of the seriousness of his (i.e., respondent's) misconduct with respect to James. During respondent's cross-examination of attorney Borges, the hearing judge precluded respondent from going into any area that respondent asserted as a defense in the James lawsuit.

After OCTC presented its aggravation evidence, respondent presented his mitigation evidence. First, respondent testified on his own behalf. He gave a general overview of his extensive experience in dealings with loans secured by second and third deeds of trust on real property. When respondent attempted to testify as to his state of mind and his alleged good faith in dealing with James (std. 1.2(e)(ii) [good faith mitigation]), the hearing judge would not let respondent proceed. In addition, the hearing judge would not let respondent testify as to any aspect of his prior dealings or transactions with James on the stated basis that they were covered in the James lawsuit. The hearing judge also concluded that such testimony was not "a proper subject of mitigation evidence."

Second, respondent called three character witness. (Std. 1.2(e)(vi) [good character mitigation].) These witnesses all testified that they believed respondent to be of good character. Next, respondent pointed out to the hearing judge that he had additional evidence in mitigation, but that it was not "admissible" under the hearing judge's

rulings on the application of collateral estoppel. Respondent did not, however, make an offer of proof as to what that additional evidence would have been.

After respondent presented his three character witnesses, OCTC presented the testimony of two rebuttal witnesses. Both of these rebuttal witnesses testified that they did not believe to be of good character. Thereafter, the parties rested.

The hearing judge permitted the parties to file written closing statements. Subsequently, the hearing judge filed his decision. In his decision the hearing judge made extensive findings of fact regarding respondent's dealings with James. In addition, as we noted above, the hearing judge found respondent culpable of committing three violations of former rule 3-300, committing acts involving moral turpitude in violation of section 6106, and failing to report the adverse judgment in the James lawsuit to the State Bar in violation of section 6068, subdivision (o)(2). Finally, the hearing judge's decision and his evidentiary rulings at trial establish that he reweighed the evidence in the record in the James lawsuit under the clear and convincing standard of proof applicable to attorney disciplinary proceedings and then relied upon that evidence to make his factual findings regarding the former rule 3-300 and section 6106 violations and various aggravating circumstances without giving respondent an opportunity to attempt to contradict, temper, or explain the adverse evidence in that record.

II. Principles of Collateral Estoppel

Principles of collateral estoppel may be applied to preclude an attorney from relitigating, in the State Bar Court, "an issue that was actually litigated and resolved

adversely to [the attorney] in a prior civil proceeding, provided (1) that the issue resulting in the civil finding is substantially identical to the issue in the State Bar Court, (2) that the civil finding was made under the same burden of proof applicable to the substantially identical issue in the State Bar Court, (3) that the [attorney] was a party to the civil proceeding, (4) that there is a final judgment on the merits of the civil proceeding, and (5) that no unfairness in precluding relitigation of the issue is demonstrated by the [attorney]. [Citation.]" (*In the Matter of Applicant A* (Review Dept, 1995) 3 Cal.State Bar Ct. Rptr. 318, 329; see also *In the Matter of Berg* (Review Dept. 1997) 3 Cal.State Bar Ct. Rptr. 725, 731.)

Furthermore, in order for a civil finding to be given preclusive effect under collateral estoppel principles, it must have been necessary to the civil judgment (*McMillin Development, Inc. v. Home Buyers Warranty* (1998) 68 Cal.App.4th 896,906.) "This requirement 'prevent[s] the incidental or collateral determination of a nonessential issue from precluding reconsideration of that issue in later litigation." [Citation.] The requirement 'is necessary in the name of procedural fairness, if not due process itself. . . .' [Citation.]" (*Ibid.*)

The application of collateral estoppel principles in attorney disciplinary proceedings, does not alter the fundamental requirement that OCTC prove each element of a charged violation by clear and convincing evidence. (*Golden v. State Bar* (1931) 213 Cal. 237, 274.) Nor does the application of those principles alter the requirement that OCTC prove each element of an aggravating circumstance by clear and convincing evidence. (Std. 1.2(b); *Van Sloten v. State Bar* (1989) 48 Cal.3d 921, 933.)

The application of collateral estoppel principles can be applied only to preclude a respondent attorney from

relitigating, in the State Bar Court, an issue (i.e., fact) that was previously decided against him in a civil proceeding under the clear and convincing burden of proof. (*In the Matter of Applicant A, supra*, 3 Cal. State Bar Ct. Rptr. At p. 329.) Thus, if a factual element of a disciplinary violation or an aggravating circumstance has not previously been found against the respondent by clear and convincing evidence in a prior civil proceeding, OCTC must prove that element in the State Bar Court with clear and convincing evidence independent of the application of collateral estoppel. To prove such an element, OCTC may choose to rely, in whole or in part, upon the record in the prior civil proceeding as evidence.

Contrary to respondent's contention, the relevant testimony of a witness given in a prior civil proceeding is admissible in State Bar Court disciplinary proceedings without regard to the availability of the witness (sec 6049.2) and is to be reconsidered and weighed by the State Bar Court as though the witness were present and testifying before it (cf. Evid. Code sec. 312 [the finder of fact determines the weight and credibility of witnesses including hearsay declarants]; Code Civ. Proc., sec 2025, subd. (u) [deposition testimony must be considered as if it were given in court during trial]). Moreover, under Evidence Code section 452, subdivision (d), the State Bar Court can take judicial notice of the non-testimonial matters (i.e., the pleadings, exhibits, jury findings, and other court documents) in a civil action that involves the course of conduct underlying the disciplinary charges against an attorney. (*Rosenthal v. State Bar* (1987) 43 Cal.3d. 612, fn. 11, 633-634, citing *Caldwell v. State Bar* (1975) 13 Cal.3d 488, 496-497; *Yokozeki v. State Bar* (1974) 11 Cal.3d 436,444.)

Whether OCTC chooses to rely, in whole or in part, upon the record in a prior civil proceeding (whether testimonial evidence, non-testimonial matters, or both) to prove one or more elements of a disciplinary violation or an aggravating circumstance independent of the application of collateral estoppel, the evidence in the civil record as well as any factual findings made by the jury or the judge in the civil proceeding cannot be judicially noticed as conclusive or otherwise given preclusive effect in the State Bar Court, but must be assessed independently by the State Bar Court under the clear and convincing standard of proof applicable in attorney disciplinary proceedings. (*In the Matter of Applicant A., supra*, 3 Cal. State Bar Ct Rptr. At pp. 324-325, citing *Rosenthal v. State Bar, supra,* 43 Cal.3d at pp. 619-620, 634 and *Maltaman v. State Bar* (1987) 43 Cal.3d 924, 949-950, 947.) Moreover, contrary to OCTC's contentions, admissions made by a respondent attorney in a prior civil proceeding are not conclusive and cannot be given preclusive effect in the State Bar Court independently of the application of collateral estoppel even if they are admissible as party admissions under Evidence Code section 1220 (*Aronow v. LaCroix* (1990) 219 Cal.App.3d 1039, 1053.) Only final judgments and orders have preclusive effect. (*Ibid.*) Such party admissions must still be independently assessed under the clear and convincing standard of proof.

Finally, whatever OCTC chooses to rely, in whole or in part, upon the record in a prior civil proceeding to prove one or more element of a disciplinary violation or an aggravating circumstance independent of the application of collateral estoppel, the respondent must always be given a fair opportunity, in the State Bar Court, to contradict, temper, or explain the evidence in the civil record with other evidence, including live testimony from the same

witnesses who testified in the civil proceeding. (*In the Matter of Applicant A, supra*, 3 Cal. State Bar Ct. Rptr. At pp 324-325, and cases there cited.) But the respondent need not be given free reign to completely retry the civil suit in the State Bar Court with the identical evidence presented in the civil proceeding. As always, the hearing judge retains the discretion to restrict or exclude cumulative evidence. (*In the Matter of Wright* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 219, 226 [hearing judge may exclude cumulative evidence]; see also Evid. Code, sec 352 [judge may exclude evidence if its probative value is outweighed by the probability that its admission will necessitate the undue consumption of time]; *Dixon v. State Bar* (1982) 32 Cal.3d 728, 736 [hearing department has discretion to exercise reasonable control over evidence in order to avoid an unnecessarily long trial].)

III. Discussion

A. Section 6106 and Former Rule 3-300

For the reasons stated below we hold: that the principles of collateral estoppel can properly be applied in this proceeding; that their application establishes that respondent committed acts involving moral turpitude in violation of section 6106; but does not establish the nature and extent of those acts. We further hold the application of those principles does not establish that respondent violated former rule 3-300.

There is no dispute that respondent was a party to the James lawsuit and that the judgment in the James lawsuit is a final judgment on the merits. Furthermore, other than making a general claim that it would be unfair to apply principles of collateral estoppel against him in this proceeding, respondent did not specifically identify any

such unfairness. Respondent did not show that he had less incentive to litigate the issues in the James lawsuit, that the jury findings in the James lawsuit are inconsistent with the findings in another judicial proceeding, or that he was required to litigate under less advantageous procedures in the James lawsuit (*In the Matter of Applicant A, supra*, 3 Cal. State Bar Ct. Rptr. At 329, citing *Stolz v. Bank of America* (1993) 15 Cal.App.4th 217, 222; see also Rest.2d Judgments, sec 28 [listing various exceptions to the general rule of issue preclusion].) Accordingly, to determine whether principles of collateral estoppel can properly be applied in this proceeding, we must first determine whether there are any issues that are common to the James lawsuit and the present disciplinary proceeding. If there are, we must determine whether they were previously adjudicated against respondent by the jury in the James lawsuit under the clear and convincing standard of proof and whether they are necessary to support the civil judgment against respondent. If there are any issues meeting these requirements, we can give them preclusive effect and use them in this proceeding to find the corresponding element or elements of the charged disciplinary violations or alleged aggravating circumstances.

Our independent review of the record in the James lawsuit discloses that the only common issues that were found against respondent by the jury under the clear and convincing standard of proof and that are necessary to support the judgment in that lawsuit are those issues that the jury found when it unanimously answered "yes" to special finding 10.[7] Special finding 10 asked the jury

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[7] With respect to special finding 10, the jury was instructed that "[I]f you find that [James] suffered actual injury, harm, or damage caused by [respondent's] breach of fiduciary duty or fraud, you must decide in addition whether by clear and convincing evidence you find that there

whether it found "by clear and convincing evidence that [respondent] was guilty of malice, oppression or fraud in the conduct upon which [it based its] finding of liability for either breach of fiduciary duty or fraud."[8]

Because the superior court used the disjunctive conjunction "or" in the phrase "malice, oppression or fraud" in special finding 10, we cannot determine whether the jury found respondent guilt of (1) malice, (2) oppression, (3) fraud, or (4) some combination of malice, oppression, and fraud when it answered "yes" to that special finding. (Compare *In the Matter of Applicant A, supra,* 3 Cal. State Bar Ct. Rptr. At p.330 [where the civil

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was oppression, malice or fraud in the conduct on which you base your finding of liability." Because the jury found that James suffered actual damages as the result of respondent's breach of fiduciary duty and fraud, it went on to answer special finding 10.

[8] The jury was instructed to use the following definitions when answering special finding 10 (all of the original internal brackets in the following definitions have been omitted as unnecessary).

"'Oppression' means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of the that person's rights."

"'Malice' means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard for the rights of others. A person acts with conscious disregard of the rights of others when he [or] she is aware of the probable dangerous consequences of his [or] her conduct and willfully and deliberately fails to avoid those consequences." (Brackets added.)

"'Despicable conduct' is conduct which is so vile, contemptable, miserable, wretched, or loathsome that it would be looked down upon and despised by ordinary decent people."

"'Fraud' means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury."

judgment recites that the jury found Applicant A guilty of fraud by clear and convincing evidence]; *In the Matter of Berg, supra*, 3 Cal. State Bar Ct. Rptr. At p. 730-732 [where the civil jury found, by clear and convincing evidence, that Berg guilty of oppression, malice, and fraud with respect to his submitting false bills to an insurance company].) Similarly, because the superior court used the disjunctive correlative conjunction of "either. . .or" in the phrase "either breach of fiduciary duty or fraud" in special finding 10, we cannot determine whether the jury found that respondent was guilty of "malice, oppression or fraud" with respect to (1) his breach fiduciary duty to James, (2) his commission of fraud on James, or (3) both when it answered "yes" to that special finding. Nevertheless, as discussed below, we conclude that the commission of any or all of these acts involves moral turpitude in violation of section 6106, but that their commission does not establish that respondent violated former rule 3-300.

1. Section 6106

Section 6106 provides that an attorney's "commission of any act involving moral turpitude. . ., whether committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension." Moral turpitude has long been defined as an act "of baseness, vileness or depravity in the private and social duties which a man owes to his fellow men, or to society in general, contrary to the accepted and customary rule of right and duty between man and man." (*In re Craig* (1938) 12 Cal.2d 93, 97.) "It has been described as any crim or misconduct without excuse [citation] or any dishonest or immoral act. The meaning and the test is the same whether the dishonest or immoral act is a felony, misdemeanor, or

no crime at all." (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 110.)

Moreover, "'[c]onduct which indicates that an attorney is unable to meet the professional and fiduciary duties of his practice may show him or her to be unfit to practice and constitute moral turpitude. [Citation.]" (*In re Strick* (1983) 34 cal.3d 891,901.) Thus, an attorney's deliberate breach of a fiduciary duty to a client involves moral turpitude as a matter of law. Further, even an attorney's non-deliberate breach of a fiduciary duty to a client involves moral turpitude if the breach occurred as a result of the attorney's gross carelessness and negligence. (*Lipson v. State Bar* (1991) 53 Cal.3d 1010, 1020; *In the Matter of Rubens* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 468, 478.) Furthermore, an attorney's deliberate breach of a fiduciary duty or a breach resulting from the attorney's gross carelessness and negligence involves moral turpitude even in the absence of an attorney-client relationship. That is because "[a]n attorney who accepts the responsibility of a fiduciary nature is held to the high standards of the legal professional whether or not he acts in his capacity of an attorney." (*Worth v. State Bar* (1976) 17 Cal.3d 337, 341; see also *Beery v. State Bar* (1987) 43 Cal.3d 802, 813.)

In light of the foregoing well-established law regarding moral turpitude, we conclude that an attorney's guilt of malice, oppression, or fraud, as those terms were defined for the jury in the James lawsuit, with respect to the attorney's breaching a fiduciary duty to either a client or a non-client involves moral turpitude in violation of 6106 as matter of law. Similarly, we conclude that an attorney's guilt of malice, oppression, or fraud with respect to his commission of an act of fraud, even in the absence of a fiduciary relationship, involves moral turpitude as a matter of law. (*In re Hallinan* (1954) 43 Cal.2d 243, 247-248

["Although the problem of defining moral turpitude is not without difficulty (citations), it is settled that whatever else it may mean, its includes fraud. . . .(Citations.) It is also settled that the related group of offenses involving intentional dishonesty for purposes of personal gain are crimes involving moral turpitude. (Citations.)].) Accordingly, we hold that, under the final judgment in the James lawsuit, the jury's answer to special issue 10 is a conclusive legal determination by clear and convincing evidence that respondent committed acts involving moral turpitude in his dealings with James and that that legal determination is binding on respondent and preclusive in this proceeding under principles of collateral estoppel. Those acts of moral turpitude establish all the requisite elements of a section 6106 violation.

However, because the superior court used, in special finding 10, the disjunctive conjunction "or" in the phrase "malice, oppression or fraud" and the disjunctive correlative conjunction "either. . .or" in the phrase "either breach of fiduciary duty or fraud," we cannot determine the factual basis for the jury's unanimous answer of "yes" to special finding 10. Because we cannot determine the factual basis for the jury's answer to special finding 10, 23 cannot determine the nature and extent of respondent's acts involving moral turpitude under the application of collateral estoppel principles. Nor can we determine the nature and extent of those acts by independently reviewing the record.

Even though the hearing judge properly admitted and judicially noticed the record in the James lawsuit (sec. 6049.2; Evid. Code, sec. 452, subd. (d)), he erred in relying upon it as evidence independent of the application of collateral estoppel principles (i.e., by reweighing the evidence in the civil record under the clear and convincing

standard of proof) without first giving respondent an opportunity to attempt to contradict, temper, or explain the adverse evidence in it. (*In the Matter of Applicant A, supra*, 3 Cal. State Bar Ct. Rptr. At pp. 324-325, and cases there cited.) We, therefore, must reverse the hearing judge's factual findings regarding the section 6106 violation. What is more, because the hearing judge did not give respondent an opportunity to attempt to contradict, temper, or explain the adverse evidence in the record in the James lawsuit, we cannot exercise our authority to independently review and reweigh the evidence in that civil record under the clear and convincing standard of proof to determine the nature and extent of respondent's acts of moral turpitude.

We find no merit to respondent's contention that the term "moral turpitude" in section 6106 is unconstitutionally vague. "It is well established that 'one to whose conduct a statute clearly applies may not successfully challenge it for vagueness." [Citation.]" (*In re Kelley* (1990) 52 Cal.3d 487, 497.) Thus, even assuming for the same of argument that the term "moral turpitude" in section 6106 is so broad that people of common intelligence must guess at its meaning, we could not sustain respondent's vagueness challenge because respondent's misconduct as found by the jury in its answer to special finding 10 falls clearly within the scope of section's 6106 proscription of acts involving moral turpitude. (*Ibid.*) Therefore, the term "moral turpitude" as used in section 6106 is not impermissibly vague as applied to respondent in this proceeding.

2. Former Rule 3-300

The requisite elements of a former rule 3-300(A) violation are that the transaction is unfair to the client or that the attorney failed to fully disclose and transmit the terms of the transaction to the client in writing in a manner

that the client should be able to understand. The requisite elements of a former rule 3-300(B) violation are that the attorney failed to advise the client in writing that the client may seek the advice of an independent attorney of the client's choice or that the attorney failed to give the client a reasonable opportunity to seek such independent advice. None of these elements was expressly addressed in special finding 10, which, as noted above, inquired of the jury whether it found "by clear and convincing evidence that [respondent] was guilty of malice, oppression or fraud in the conduct upon which [it based its] finding of liability for either breach of fiduciary duty or fraud." Furthermore, none of the elements of a former rule 3-300 violation are expressly addressed in the definitions given to the jury with respect to special finding 10, which definitions are quoted above in footnote 10. Thus, the application of collateral estoppel principles does not establish that respondent violated former rule 3-300.

Moreover, in making his factual findings regarding the former rule 3-300 violations, the hearing judge erred in reweighing the evidence in the James lawsuit under the clear and convincing standard of proof without first giving respondent an opportunity to attempt to contradict, temper, or explain that evidence. (*In the Matter of Applicant A, supra*, 3 Cal. State Bar Ct. Rptr. at pp. 324-325, and cases there cited.) Because of that error, we cannot exercise our authority to independently review and reweigh the evidence in the James lawsuit under the clear and convincing standard of proof and make our own findings with respect to the charged former rule 3-300 violations.

In sum, we reverse the hearing judge's factual findings and legal conclusions that respondent violated former rule 3-300 and remand the matter for a new trial with respect to the charged former rule 3-300 violations.

In sum, we reverse the hearing judge's factual findings and legal conclusions that respondent violated former rule 3-300 and remand the matter for a new trial on the issue of respondent's culpability on the charged former rule 3-300 violations.

B. Section 6068, subdivision (o)(2)

Respondent does not challenge the hearing judge's factual findings showing that respondent failed to report, to the State Bar, the entry of the judgment against him in the James lawsuit. Nor does respondent challenge the hearing judge's culpability conclusion that respondent's failure to report the judgment violated section 6068, subdivision (o)(2). After independently reviewing the record, we agree with the hearing judge and adopt his factual findings and culpability conclusion regarding this charge.

C. Aggravating and Mitigating Circumstances

Aggravating and mitigating circumstances are events or factors surrounding the particular misconduct of which an attorney has been found culpable that show that a greater or lesser degree of sanction is warranted. (Stds. 1.2(b) & 1.2(e).) In that regard, aggravating and mitigating circumstances are often directly related to or dependent upon the specific misconduct found to have been committed. (See, e.g., std. 1.2(b)(ii) [found misconduct evidences multiple bad acts]; std. 1.2(b)(iii) [found misconduct surrounded or followed by bad faith]; std. 1.2(e)(ii)[good faith of attorney]; std. 1.2(e)(vii) [objective steps take by attorney to atone for consequences of the found misconduct].) Accordingly, because we have reversed most of the hearing judge's findings and conclusions regarding respondent's culpability, we also reverse the hearing judge's findings as to aggravating and

mitigating circumstances. We do so in order to provide both parties with an adequate opportunity to present their aggravating and mitigating evidence with respect to whatever particular misconduct may be found on remand.

In any event, for the reasons stated above, the application of collateral estoppel principles does not provide support for the hearing judge's aggravation fidings. As with culpability, in making some of his findings in aggravation, the hearing judge reweighed the evidence in the James lawsuit without first giving respondent an opportunity to contradict, temper, or explain the adverse evidence. In addition, the hearing judge did not give respondent an opportunity to present all of his relevant mitigating evidence. These errors also require that we reverse the hearing judge's findings regarding aggravating and mitigating circumstances and preclude us from exercising our authority to independently reweigh the evidence.

D. The Hearing Judge was Impartial

Finally, we address one remaining issue raised by respondent because it is germane to further proceedings in the hearing department on remand. Under the most generous of readings, we construe respondent's contention regarding the hearing judge's impartiality as arguing that the hearing judge was not impartial because the State Bar pays his judicial salary as mandated under section 6079.1, subdivision (d) and because the State Bar was in a funding crisis as a result of the governor's veto of the State Bar's fee bill in 1997. Respondent does not contend and cite to the place in the record where he timely filed a motion seeking to disqualify the hearing judge on these grounds as required by rule 106 of the Rules of Procedure of the State Bar, title II, State Bar Court Proceedings, and where that

motion was denied. By not properly raising this issue, respondent has waived any error. (Rules Proc. of State Bar, title II, State Bar Court Proceedings, rule 302(a); State Bar Court Rules of Practice, rule 1320; *In the Matter of Berg, supra*, 3 Cal. State Bar Ct. Rptr. at p. 736.) Nonetheless, we exercise our discretion and address respondent's arguments on the merits in the interest of justice.

We have repeatedly rejected as meritless arguments that a hearing judge is not impartial because the State Bar pays the judge's statutorily mandated salary. (See, e.g., *In the Matter of Acuna* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 495, 500-501; *In the Matter of Stewart* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 52, 59.) Moreover, the fact that the State Bar might use a portion of the costs that it recovers from disciplined attorneys to pay the hearing judge's salary does not create a disqualifying condition. That is primarily because the vast majority of all costs recovered are recovered in accordance with a Supreme Court disciplinary order (not a State Bar Court order) that includes an award of costs to the State Bar in accordance with the statutory provision for costs in section 6086.10 (CF. *In re Rose* (2000) 22 Cal.4th 430, 439, citing *In re Attorney Disciplinary System* (1998) 19 Cal.4th 582, 600-601 [before the Supreme Court issues disciplinary order, it exercises its independent and inherent jurisdiction over attorney discipline and independently determines whether to impose the discipline recommended by the State Bar Court].) Respondent cannot plausibly contend that the Supreme court's independent and statutory award of costs to the State Bar, even if made on the recommendation of the State Bar Court, creates a condition disqualifying the State Bar Court. (Accord *In the Matter of Stewart, supra,* 3 Cal. State Bar Ct. Rptr. at p. 59.)

The only instance in which the State Bar Court can assess costs on disciplined attorneys is in those cases in which the State Bar Court publicly reproves the attorney. (sec. 6086.10, subd. (a).) Respondent was not publicly reproved.

Moreover, the fact that a portion of the hearing judge's salary might conceivably be paid from part of the costs the State Bar recovers from disciplined attorneys does not create a disqualifying condition because the amount of costs actually recovered are relatively nominal to the State Bar's budget. (*In the Matter of Acuna, supra*, 3 Cal. State Bar Ct. Rptr. at p. 501, fn.2; compare *Ward v. Village of Monroeville, Ohio* (1973) 409 U.S. 57, 60 [where the mayor of Monroeville was disqualified from acting as the judge in ordinance and traffic violation cases because the fines and costs recovered for ordinance and traffic violations made up a major portion of the village's income and because the mayor had executive authority over the village's finances].)

Finally, we also reject as meritless respondent's argument that the hearing judge was not impartial because the State Bar was in a funding crisis in 1998 during part of the trial in this matter and while this matter was under submission for a decision by the hearing judge. Throughout the State Bar's funding crisis in 1998 and early 1999, the State Bar Court Judges voluntarily agreed to temporarily receive a reduced salary from the State Bar. (*In re Attorney Disciplinary System, supra*, 19 Cal.4th at p. 614.) We fail to see how such a voluntary reduction in salary to permit the State Bar to operate within its budgetary constraints under rule 963 of the California Rules of Court could have plausibly created a financial interest that would have required the recusal of the hearing judge.

IV. Remand Order

Applying principles of collateral estoppel, we conclude that respondent Bolden Bruce Kittrell is culpable of violating Business and Professions Code sections 6106. Moreover, adopting the hearing judge's findings of fact and conclusions of law with respect to the charged violation of Business and Professions Code section 6068, subdivision (o)(2), we conclude that respondent is culpable of that charged violation.

In light of the foregoing conclusions and our reversal of most of the hearing judge's findings and conclusions, we order that this matter be remanded to the hearing department for a new trial on the following issues: (1) findings of fact surrounding respondent's violation of Business and Professions Code section 6106; (2) findings of fact and conclusions of law regarding the charged violations of rule 3-300 of the former Rules of Professional Conduct of the State Bar; (3) findings of fact and conclusions of law regarding aggravating and mitigating circumstances; and (4) the appropriate level of discipline.

On remand, the evidence shall be reopened as to both parties with respect to the above issues. However, the evidence that is presently part of the record need not be re-introduced. Moreover, the record of the James lawsuit, which is admitted into evidence in the hearing department, may be properly considered on remand by the hearing judge. However, respondent must be given a fair opportunity to contradict, temper, or explain that evidence with other evidence, including live testimony from the same witnesses who testified in the civil proceeding. Yet the hearing judge need not retry the civil suit in this disciplinary proceeding as she or he retains the sound discretion to restrict or exclude cumulative evidence and otherwise control the introduction of evidence as in any

other case. The hearing judge's decision on remand should, again as in any other case, be based on a balanced consideration of all the competent evidence admitted, whether documentary, hearsay, live testimony, or other.

NORIAN, J.

We concur:

OBRIEN, P.J.
STOVITZ, J.

s/_____
James W. Obrien
Presiding Judge

PUBLIC MATTER
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STATE BAR COURT
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THE STATE BAR COURT
HEARING DEPARTMENT-LOS ANGELES

In the Matter of	)	Case No. 95-0-14321-RMT
BOLDEN BRUCE KITTRELL,	)	DECISION ON REMAND AND
No. 40896	)	ORDER OF INVOLUNTARY
A Member of the State Bar	)	INACTIVE ENROLLMENT

I. INTRODUCTION

Upon remand by the Review Department, a new hearing was held in this matter, giving Respondent **BOLDEN BRUCE KITTRELL** a full opportunity to contradict, temper, or explain any of the evidence in the record.

Based on a balanced consideration of all the competent evidence admitted, this court agrees with and adopts each of the factual and culpability findings of the Hearing Department's original decision filed March 18, 1999. Respondent is found culpable, by clear and convincing evidence, of serious misconduct involving an unfair

business transaction with a client. He failed to avoid interests adverse to a client without following certain prophylactic requirements, committed acts of moral turpitude and failed to inform the State Bar of the entry of judgment against him in a civil action for fraud and breach of fiduciary duty.

The court believes that, in view of Respondent's lack of remorse and insight into his wrongdoing, the public is at great risk unless Respondent is disbarred.

II. PROCEDURAL BACKGROUND

On October 26, 2000, the Review Department of the State Bar Court issued a remand order in *In the Matter of Kittrell* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 195, 211:

> "[W]e order that this matter be remanded to the hearing department for a new trial on the following issues: (1) findings of fact surrounding respondent's violation of Business and Professions Code section 6106; (2) findings of fact and conclusions of law regarding the charged violations of rule 3-300 of the former Rules of Professional Conduct of the State Bar; (3) findings of fact and conclusions of law regarding aggravating and mitigating circumstances; and (4) the appropriate level of discipline."

Under the remand order, a new trial was held on July 23 and 26, 2001. Respondent represented himself. Deputy Trial Counsel Charles A. Murray of the Office of the Chief Trial Counsel, Enforcement, represented the State Bar.

On July 25, 2001, the court issued an order regarding tentative culpability findings. The matter was submitted for decision on September 24, 2001, after the filing of closing briefs.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The following findings of fact and conclusions of law are based on the evidence admitted at the prior hearing. No additional evidence was submitted at this hearing.

In view of the Review Department's remand order, this court was particularly concerned that Respondent be given a fair and full opportunity to contradict, temper, or explain the adverse evidence with other evidence, including live testimony from the same witnesses who testified in the civil proceeding. This court had repeatedly asked Respondent if he wished to offer any such evidence. He declined.

Respondent did not take the stand in this hearing and testified in his own defense nor did he call any witnesses for the purpose of contradicting, tempering, or explaining any adverse evidence that may be in the record.

During the culpability portion of the trial, he presented no live witnesses but relied totally and exclusively on the record from the prior testimony and exhibits in *James v. Kittrell*, Orange County Superior Court, case no. 70-87-30, and in the 1998 State Bar Court hearing conducted by Judge Carlos E. Velarde. Respondent declined to offer any such evidence because, according to him, he did not want to jeopardize his appeals that are pending in the United States Supreme Court. He also indicated that all of the testimony which went to contradict, temper or explain the adverse evidence had been previously testified to by himself in the earlier proceedings.

However, in his closing brief of September 21, 2001, Respondent blamed the State Bar for failing to produce witness Czarine Hope James for him to cross-examine. Such contention is without merit as the State Bar did not have the burden to produce any live witness in this

proceeding and Respondent was so advised at a status conference on March 29, 2001. Had Respondent wished to contradict, temper, or explain the adverse evidence in the record, he should have done so at trial and not relied upon the State Bar to call witness James or any other witnesses.

A. Jurisdiction

Respondent was admitted to the practice of law in California on December 21, 1967, and has since been a member of the State Bar of California.

B. Original Hearing Decision Filed March 18, 1999

After giving Respondent a full opportunity to contradict, temper or explain the adverse evidence in the civil record, *James v. Kittrell*, the court has carefully reviewed the evidence in the record and finds by clear and convincing evidence that Respondent willfully violated rule 3-300 of the former Rules of Professional Conduct of the State Bar (in effect May 27, 1989 to September 13, 1992). The court further concludes that the findings of fact and conclusions of law in the original hearing decision filed March 18, 1999, including the facts surrounding Respondent's violation of Business and Professions Code section 6106, should be and are fully adopted and therefore, are hereby set forth as follows:

C. Findings of Fact

1. *Background Regarding Moro Landis Studios Property*

In 1986, the Moro Landis Studios, commercial property in Studio City, California, was sold for $1.06 million. The seller, Ruth Moro, realized $740,000 from the sale and took back a second trust deed of $260,000. Both Moro and her buyer, a corporation owned by Karl Harz, a mortgage

broker, were satisfied with the purchase price of the property. Harz felt that the property was worth $1.5 to $2 million.[1]

In August 1988, Respondent, a licensed real estate broker, raised $600,000 from investors in the name of Bolden Realty[2] and loaned the $600,000 to Harz. According to Harz, the property was very run down and he spent $250,000 in repairs when he first bought the property and made additional improvements with the $600,000 loan from Bolden.

The funds were loanded to Harz in exchange for a promissory note secured by a third deed of trust. Bolden Realty held the third trust deed in its name allegedly for the convenience of its investors. At this time, the Moro Landis Studios was encumbered by a first trust deed in the sum of $635,000 and a second trust deed in the amount of $260,000. With the third trust deed, the total encumbrance on the property was $1,495,000.

In 1989, Harz defaulted on the three trust deeds. On December 18, 1989, Bolden Realty foreclosed on the third trust deed and became the owner of Moro Landis subject to the first and second trust deeds. The $600,000 third trust deed was extinguished.

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[1] Despite the improvements made on the Moro Landis property, its value decreased, according to a January 1988 appraisal, which valued it at $2.25 million, and a January 1989 appraisal for $2 million

[2] Respondent owned 100% interest in and was president of Bolden Realty. He conducted business in his individual capacity as the Bolden Group. Through Bolden Realty, he did business with persons who had equity in their property but could not qualify for loans with most banks. According to Respondent, he did not lose money for any of his investors for 12 to 15 years but when a recession struck in late 1992 to 1993, he experienced problems with first, second, third and fourth deeds of trust. His own home of 17 years was foreclosed and sold in 1994 and he received no money after its sale.

After 1989, Moro Landis' annual net operating income[3] was approximately $70,000 while the debt service on the first and second trust deeds exceeded $100,000. In order to obtain funds to service the debts, on March 1, 1990, Respondent, through Bolden Realty, issued a $450,000 note secured by a new third trust deed and began selling fractional interests in that note to investors. At this time, the net operating income was insufficient to make the debt service payments on the first and second trust deeds. Respondent undertook this new third trust deed despite the recent failure of the $600,000 third trust deed upon which he, through Bolden Realty, had foreclosed in 1989.

On March 1, 1991, the $450,000 note came due. Respondent intended to pay investors in the note by selling or refinancing the property. In 1990, he listed the property at $1,950,000 but was unable to sell it. He only received an offer in the $900,000 range. He also tried to refinance the property in 1990 and 1991 but was unsuccessful.

Because the real estate market was down and, in order to maintain interest payments to existing investors, Respondent[4] extended the note's ("extended note") due date to March 1, 1993, and increased its amount to $550,000. He began selling new fractional interests to new investors which was the only way he could maintain interest payments to existing investors. At this time, the net operating income was insufficient to make the debt service payments on the first, second and third trust deeds. In October 1991, Pacific Gas and Lighting, the holder of the first trust deed filed a notice of default on the property. Respondent received a copy of the notice in the mail.

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[3] The net operating income is the property's income after expenses but before the debt service payments are made.

[4] Respondent's law office was also used to conduct business for Bolden Realty.

2. *The James Investment*

On November 26, 1991, Czarine Hope James and her friend, Johnnie Maxey, met with Respondent at his law office[5] to discuss the possibility of her investing some money. Maxey had previously invested with Respondent. Maxey had told James that she could obtain a better return on her money by investing with Respondent, an attorney and partner in a law firm, than at the bank. James had told Maxey about her efforts to save as much money as she could because she wished to purchase a condominium.

James was a 59-year-old Jamaican woman with a 12th-grade education. She had minimal prior investment experience. When she met with Respondent, she was living with her son and earning about $6 per hour as a clerk in a public storage facility. Her assets consisted of $68,000 she had in a bank and two Individual Retirement Accounts worth approximately $12,000.

During the November 1991 meeting, Resopndent introduced himself as an attorney and gave her his law firm business card. Bolden Realty was never mentioned. James also asked Respondent for legal advice regarding the tax consequences of her divorce settlement. He indicated that, based on a new law, he did not believe her divorce settlement was taxable but that he would advise her further once she sent him her divorce papers. James did so and Respondent then advised her that the settlement would not be taxable. James never paid Respondent a fee for his legal advice.

At the same November 1991, meeting, Respondent offered James the opportunity to invest $54,000 for a fractional interest in the extended Moro Landis Studios

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[5] Respondent signed the extended note on behalf of both the borrower, Bolden Realty, and the lender, Bolden Group.

note.[6] He advised her that the investment would have a 14% rate of return, that there would be monthly interest payments and that the principal would be repaid in three to four months. He calculated for her the amount of interest payments she would receive. Respondent did not consider James to be a sophisticated investor when they met.

Respondent made no other disclosures to James about the investment, including information about the specific purpose of the loan[7] or the financial condition, asssets or liabilities of the property. James expressed to Respondent her concern about the possibility of losing her funds as they consisted of her life savings which she was going to use to purchase a condominium in three to four months. Respondent assured her that it was a good investment and that, although anything was possible, in this deal, she could not lose her money.

A few days after the meeting, James went to obtain a cashier's check for the investment. Since she did not know to whom the check should be made payable, she called Respondent who said to make it out to Bolden Realty. Respondent did not explain what Bolden Realty was and James did not ask. On December 1, 1991, James sent Respondent a check for $61,000 made payable to Bolden Realty.

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[6] At the meeting, Respondent also sought James' investment of $7,000; however, that transaction was not the basis of the *James v. Kittrell* superior court action and is not the subject of disciplinary charges herein.

[7] Respondent avers that he informed James that the purpose of the loan was to assist the Moro Landis Studios in its operational expenses until the property could be refinanced, sold or until business increased. The court does not find this credible. But the court does find credible James' and Maxey's testimony that they did not remember such information being imparted.

Respondent did not obtain a current appraisal of the property prior to accepting James' money. He had appraisals in the amount of $2.2 million and $2.25 million that here nearly four and three years old, respectively, at the time he met with James.

When Respondent refinanced in January 1992, the annual debt service on the three Moro Landis Studios trust deeds was approximately $97,200 on the first, $28,000 on the second and $60,000 on the third. Moreover, the total encumbrances on the property amounted to $1,620,000: $635,000 on the first trust deed (which Respondent was in the process of increasing to $810,000); $260,000 on the second; and $550, 000 on the third trust deed. Respondent knew or had reason to know that the property was overencumbered and that the property was unable to support the extended third trust deed which he had offered James for her investment.

This court finds credible the uncontroverted superior court testimony of Steven Decker, an M.A.I.-certified real estate appraiser, who conducted an M.A.I. appraisal of the Moro Landis Studios in 1994. Decker opined that, as of November 26, 1991, the property's fair market value was $725,000 and could not support the first or second trust deed in which James had invested.

On January 9, 1992, after James had already received her first interest payment on the Moro Landis investment, Respondent sent James documents, including a Declaration of Trust and Beneficiary Agreement ("Agreement"), to execute. The Agreement purported to memorialize James' investment; however, it did not disclose to her that the investment was in a third trust deed or the risks involved in the investment. It also reflected that the promissory note securing the deed of trust was for $450,000 instead of $550,000.

In reviewing the Agreement, James noticed that it provided that the principal of her investment was payable on March 1, 1993, rather than the three or four months agreed upon with Respondent. James called Respondent, who informed her that she would get her money back in three or four months and that the March 1, 1993, due date was a mere convenience in the event she wanted to reinvest her funds after the three or four month period. James executed the Agreement in reliance on Respondent's representations; however, she did not fully understand what she had invested in or with whom.

The nature of the investment and the risks involved in her investment were never disclosed to James in writing and in terms that she could reasonably understand. The risks about which James was not informed included: 1) that the existing encumbrances on the Moro Landis property exceeded its market value. Respondent had no current appraisal of the property when he took James' money. The most recent appraisal had been completed in 1989; 2) that its net operating income was insufficient to pay the debt service and that the only means of making the debt service payments to her and to other investors was to further encumber the property and to sell new investments to new investors. Respondent did not consider the borrower's ability to repay the loan relevant; 3) that recent or previous attempts to sell or refinance the property had been unsuccessful; and 4) that the property had a history of previous and current defaults and foreclosures, including a foreclosure action commenced as recently as one month before the November 1991 meeting among James, Respondent and Maxey. Respondent knew or reasonably should have known that these concealed facts were material to James in deciding to invest with him. Moreover, Respondent failed to advise James in writing that she could

seek the advice of independent counsel concerning the investment she was contemplating making with Respondent.

3. *The Failed Condominium Transactions*

In late February 1992, James called Respondent to request the return of her invested funds as she had decided to purchase a condominium. Respondent indicated that he would return the money and James commenced an escrow for the condominium. Respondent, however, failed to return James' money as promised and James' condominium fell out of escrow.

Respondent assured James that he would return her money soon. On the basis of Respondent's representation, James committed to a second escrow in mid-summer 1992. Respondent again failed to return her money and the property fell out of escrow.

In mid-fall 1992 and based on Respondent's representation that her funds would be returned, James entered into a third escrow to purchase a residence in a senior citizen community. Respondent stopped making interest payments on James' investment and the property she sought to purchase again fell out of escrow.

Respondent's failure to return her investment resulted in the condominium falling out of escrow three times which caused James stress and the loss of approximately $2,300 in closing costs. She also lost money because she was paying for storage space awaiting the purchase of the condominium.

In 1991, 1992 and 1993, Respondent earned a minimum of $244,000 in commissions and management fees on the Moro Landis property.

4. *The Superior Court Litigation*

Thereafter, James sued Respondent for, among other things, fraud and breach of fiduciary duty, for his conduct regarding her investment in the Moro Landis Studios. Attorney Evan Borges represented her on a pro bono basis because he was distressed by the great injustice in Respondent's dealings with James.

The jury was instructed and found by clear and convincing evidence in a special verdict rendered July 19, 1994, that there was malice, oppression or fraud in Respondent's conduct upon which the jury found him liable for fraud and breach of fiduciary duty. On that basis, James was awarded $61,000 in punitive damages relating to the fraud and breach of fiduciary duty counts pursuant to the Judgment on Special Verdict entered November 21, 1994. The judgment also awarded James $217,235.10 in compensatory damages plus interest and costs. The judgment was affirmed in an unpublished opinion by the Court of Appeal, Fourth Appellate District, filed on October 16, 1996. Respondent's petition for rehearing was denied by order filed November 5, 1996. By letter dated December 10, 1996, the California Supreme Court declined to permit Respondent's untimely filing of his petition for review. By letter dated April 10, 1997, the United States Supreme Court notified the parties that Justice O'Connor had denied the application for an extension of time to file a petition for a writ of certiorari in *James v. Kittrell.*

Respondent told attorney Borges after the filing of the lawsuit that he had no intentions of paying James her money. Borges defended against Respondent's post-trial efforts to defeat the superior court judgment rendered against him in *James v. Kittrell* and was unsuccessful in trying to collect on that judgment, including from Respondent's insurance carrier, Golden Eagle. (However,

in his September 21, 2001, closing brief, Respondent claims that his insurance carrier had paid James $35,000.) Borges also represented James in an adversarial proceeding regarding Respondent's bankruptcy which resulted in an order that the superior court judgment would not be discharged. (Nondischargeable Judgment, entered March 14, 1997, *In re Bolden Bruce Kittrell,* United States Bankruptcy Court, Central District of California, case number LA-95-35159 BR (AD96-01075).)

Borges unsuccessfully tried to satisfy the judgment by attempting to reach Respondent's interest in an Arizona ranch valued at $700,000. Respondent transferred his interest in the ranch to a corporation owned by his wife. Borges has no funds to challenge what he believes was a fraudulent transfer. Borges further believes that Respondent had, at the time of the superior court action, the ability to pay James and the Client Security Fund based on his other assets, which included an eight-acre estate in Rolling Hills, an airplane with an estimated value of $125,000, a Rolls Royse leased at $4,000 per month in 1991, and a leased Mercedes driven by his wife.

According to Respondent, these assets have been foreclosed or sold by the bankruptcy trustee. Respondent contends that he no longer enjoys the lifestyle he had in 1991 and before. He now leases two modest cars for his wife and himself and pays $1,050 per month for both cars. He avers that he has no money other than to meet his current living expenses. He is paying back federal taxes at $100 per month on a total of $4,000 to $5,000. His only source of income is from his practice from which he grossed over $100,000 in 1996 and approximately the same in 1997.

5. *Other Consequences of Respondent's Conduct*

During the pendency of the superior court matter, James suffered physical harm as a result of Respondent's conduct. She broke out in a serious rash and needed dental care that she could not afford. The latter resulted in the loss of several teeth due to periodontal problems. Her blood pressure would go up and down. James also suffered hair loss and a serious period of depression.

James had to make financial sacrifices to pay the costs of the superior court case against Respondent. The costs were approximately $6,000. She charged about $4,000 of this amount on her VISA credit card which she was unable to repay until she received the $27,000 from Respondent's law partners in 1994. At this time, James was heavily in debt. She had very little money left over from the $27,000. Borges estimated that James had spent over 10,000 in costs in the various legal actions regarding Respondent.

As of November 17, 1998, James had recovered $27,000 from Respondent's law partners who also were named in the superior court matter but were not personally involved in Respondent's conduct and $31,000 from the Client Security Fund ("CSF") for a total of $58,000. Further, James received $7,333 in 11 interest payments from Respondent immediately following her investment with him.

As of September 21, 2001, Respondent claims that he had paid her $18,200 and had entered into an agreement to pay her a balance of $17,400. He states that he currently does not have $17,400 to pay her but is seeking to obtain the funds. In addition, he asserts that his insurance carrier had paid $35,000 to James. Although she may have

received about $111,200 on her net investment of $54,000, it is uncertain what her litigation costs and expenses were.[8]

Respondent has no remorse with regard to James' case, since, in his mind, she has been made more than whole by the sums she has received from others and from CSF. He feels no personal responsibility toward her. He never offered her an apology for the troubles and pain he caused her. He has admitted no wrongdoing. He offered no explanation to her after he stopped making the interest payments on her investment. Respondent begrudgingly feels some obligation to CSF and hopes to pay them back some day.

D. Conclusions of Law

1. Counts One and Two- Rule 300(A) of the Former Rules of Professional Conduct[9]

Rule 3-300 of the former Rules of Professional Conduct provides that an attorney shall not enter into a business transaction with a client or knowingly acquire an interest adverse to a client unless the transaction or acquisition is fair and reasonable to the client, is fully disclosed to the client, the client is advised in writing that the client may seek the advice of an independent lawyer of the client's choice and is given a reasonable opportunity to do so, and the client thereafter consents in writing to the transaction or acquisition.

There is clear and convincing evidence that Respondent willfully violated former rule 3-300(A).

Culpability pursuant to former rule 3-300 is not triggered unless James was a client. The evidence and law

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[8] Respondent returned the other $7,000 she had originally given him.

[9] Unless noted otherwise, references to rules are to the former Rules of Professional Conduct of the State Bar (in effect May 27, 1989 to September 13, 1992).

support a finding that she was, indeed, Respondent's client. James met with Respondent at his law office, at which time he introduced himself as an attorney and gave her his law office's business card. She consulted with him at that time regarding the tax consequences of her divorce settlement and Respondent gave some preliminary legal advice subject to review of the divorce documents which James later sent him. Respondent then advised her.

An attorney-client relationship may arise from a preliminary consultation by a prospective client seeking and receiving legal advice even without a fee agreement or subsequent representation. (*Beery v. State Bar* (1987) 43 Cal.3d 802, 811-812; *Miller v. Metzinger* (1979) 91-Cal.App.3d 31, 39-40.) Respondent assumed a position of trust and confidence vis a vis James regarding the investment. He accepted responsibility of a fiduciary nature that is held to the high standards of the legal profession whether or not he or she acts in the capacity of an attorney. (*Worth v. State Bar* (1976) 17 Cal. 3d 337, 341.) In such situations, the nonclient may be treated as a client for disciplinary purposes. (*In the Matter of Hultman* (Review Dept. 1995) 3 Cal.State Bar Ct. Rptr. 397, 307.)

Moreover, the transaction in question placed Respondent in an adverse position to James. Respondent was president and 100% owner of Bolden Realty, a party to the transaction (i.e., one of the borrowers). In addition, at the time of James' investment, Bolden Realty was the owner of the Moro Landis Studios. The amount and term of the trust deed in which James invested were unilaterally extended by Respondent on behalf of both the borrower, Bolden Realty, and the lender, Bolden Group, in March 1991 when he did not have the funds to pay off the note. Respondent borrowed money from James to maintain what, in effect, was his property. He also earned commissions

and management fees in the transactions regarding the property despite its net operating income being insufficient to pay the debt service.

"When an attorney-client transaction is involved, the attorney bears the burden of showing that the dealings between the parties were fair and reasonable and were fully known and understood by the client." (Hunniecutt v. State Bar (1988) 44 Cal.3d 362, 372-372.) Accordingly, by accepting James' investment in overencumbered property that could not support her investment, Respondent willfully violated former rule 3-300(A) in count one by entering into a transaction with a client in which the terms were not fair and reasonable to the client.

By accepting James' investment without fully disclosing to her in writing the terms of the transaction in a manner which should reasonably have been understood by the client, Respondent willfully violated former rule 3-300(A) in count two.

2. *Count Four – Rule 300(B) of the Former Rules of Professional Conduct*

The Review Department adopted the original hearing finding that Respondent willfully violated section 6106.

Section 6106 mandates suspension or disbarment for the commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not. Although Respondent believed James not to be a sophisticated investor, he induced her investment with him by concealing from James the true financial condition of the Moro Landis Studios property and Respondent's self-dealing (i.e., his ownership interest in the investment, increasing the amount and duration of the third trust deed,

paying himself commissions and management fees, etc.). Moreover, Respondent failed to promptly return James' investment funds within three or four months as agreed. Accordingly, the court finds that Respondent's actions as to the James investment constituted acts of concealment and deception amounting to moral turpitude pursuant to section 6106. (*Slavkin v. State Bar* (1989) 49 Cal.3d 894,903; *Coppock v. State Bar* (1988) 44 Cal.3d 665.)

4. *Count Five – Business and Professions Code Section 6068(o)(1)*

In relevant part, section 6068(o) requires an attorney to report in writing to the State Bar within 30 days of thetime he has knowledge of certain events, including: 1) the filing of three or more lawsuits in a 12-month period against the attorney for malpractice or other wrongful conduct committed in a professional capacity; and 2) the entry of judgment against an attorney in any civil action for fraud, misrepresentation, breach of fiduciary duty or gross negligence committed in a professional capacity.

The Review Department adopted the original hearing finding and dismissed the charge of section 6068(o)(1) with prejudice.

5. *Count Six – Business and Professions Code Section 6068(o)(2)*

The Review Department adopted the original hearing and found that Respondent had willfully violated section 6068(o)(2) by failing to report to the State Bar the *James* judgment for fraud, breach of fiduciary duty and legal malpractice. The judgment was entered in favor of James, a total of $217,235.10, together with costs and an award of punitive damages for $61,000.

IV. MITIGATING AND AGGRAVATING CIRCUMSTANCES

A. Mitigation

Under the remand order, during the disciplinary phase of the trial, this court gave Respondent a full opportunity to present any mitigating evidence and to contradict, temper or explain the adverse evidence in the record with other evidence. (Standard 1.2(e) of the Standards for Attorney Sanctions for Professional Misconduct (StD).)

Respondent's 24 years of blemish-free practice at the time of his misconduct is a mitigating factor. (Std 1.2(e)(i); *In the Matter of Stamper* (Review Dept. 1990) 1 Cal.State Bar Ct. Rptr. 96.)

Respondent called two character witnesses to testify on his behalf. One has known Respondent for more than 50 years and the other more than 25 years. They both attested to his good character and to his integrity. One was somewhat familiar with the *James* lawsuit while the other had only heard of the case. The testimony of two witnesses does not constitute an extraordinary demonstration of good character of the member attested to by a wide range of references in the legal and general communities. (Std 1.2(e)(vi).) Therefore, this evidence is afforded little weight.

Involvement in pro bono activities is a mitigating factor. (*In the Matter of Crane & DePew* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 139, 158, fn. 22.) Respondent has been a member of the Los Angeles International Airport Optimist Club, a charitable organization, for 30 years and has served as president and as a member of the board of directors for 25 years. He has also been involved in other community work with the Children's Orthopaedic Hospital in Los Angeles and the rebuilding of Los Angeles.

B. Aggravation

There are many aggravating factors.

Respondent committed multiple acts of wrongdoing involving his client. (Std. 1.2(b)(ii).) He entered into an unfair business transaction with James, failed to fully disclose and transmit the terms of the transaction to her in writing in a manner that she should be able to understand, and failed to advise her in writing that she may seek the advice of an independent attorney of her choice. Also, breach of his fiduciary duty to James involved moral turpitude.

Respondent's misconduct harmed significantly James. (Std 1.2(b)(iv).) She suffered physically, emotionally and financially due to Respondent's misconduct. She also had to seek legal assistance and resort to the legal system to seek redress for his misconduct.

Respondent has demonstrated indifference toward rectification of or atonement for the consequences of his misconduct. (Std 1.2(b)(v).) Although Respondent has made partial payment of restitution to James, he feels no responsibility for what happened to her and has not offered an apology. Respondent's failure to accept responsibility for his actions is not based on his honest belief in his innocence, but rather, in recalcitrance. This failure indicates a lack of insight which causes this court grave concern that Respondent will repeat his misdeeds. (*In the Matter of Priamos* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 824.)

Moreover, Respondent has made no attempt at restitution toward CSF. He believes that James has already been paid by others, such as his partners and law firm, the insurance carrier and CSF. His failure to fully satisfy the superior court judgment of $217,235.10 plus costs is an aggravating circumstance. (*Garlow v. State Bar* (1988) 44

Cal.3d 689, 711.) Now he claims that his financial position has deteriorated but that he will try to pay James $17,400. But even before the economic downturn, when Respondent had the financial ability to reimburse CSF and pay James, he had refused to pay. He did not give this obligation any priority in light of maintaining his lifestyle, which included living in an "eight-acre equestrian estate in Rolling Hills, with a main house, one bedroom guest house, swimming pool, tennis court, a six-stall barn and groom's quarters. . .He also. . .owned a Beechcraft Bonanza airplane. . .a ranch in Arizona worth over $700,000. (Court of Appeal opinion filed October 16, 1996.)

Further, Respondent's unsupported arguments in continuing to assert contrary facts despite the findings of the superior and appellate courts indicate his "lack of appreciation both for his misconduct and for his obligations as an attorney." (*In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 647.)

Respondent's misconduct was clearly surrounded by dishonesty and concealment and he displayed a lack of candor and cooperation to the victim of his misconduct. (Stds 1.2(b)(iii) and (vi).) Nevertheless, the court does not find these to be additional aggravating circumstances because the same acts that constitute these aggravating factors were also charged as substantive offenses and Respondent has been found culpable of those offenses. (*In the Matter of Simpson* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 119.)

V. DISCUSSION

The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, to preserve public confidence in the profession and to maintain the highest possible professional standards for attorneys.

(*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111; *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1025; std 1.3.)

This case involves misconduct in a business transaction with a client. In determining the proper degree of discipline, the court looks to the standards as well as to case law for guidance. The standards provide for reproval, suspension or disbarment, depending upon the gravity of the offenses and the harm to the clients. (Stds1.6(a), 2.3, 2.6 and 2.8.) The most severe sanction is set forth in std 2.3 which recommends disbarment or suspension for acts of moral turpitude, fraud, intentional dishonesty or concealment of a material fact toward a court, client or another person depending on factors including the extent to which the victim was misled or harmed; the magnitude of the misconduct; and the degree to which the misconduct relates to the practice of law.

Respondent argues that the court should either dismiss this matter or place him on probation. He insists that he has done nothing wrong and that no unfairness or moral turpitude was involved. Respondent is recalcitrant, denying that James was his client even though he had advised her on the taxable effects of her divorce settlement. He adamantly maintains that the investment was a mere reflection of the economic downturn, despite the findings of the superior court, the court of appeal, the Review Department, and this court that he had defrauded James and despite the jury award in punitive damages of $61,000 for fraud and breach of fiduciary duties.

The State Bar asserts that Respondent should be disbarred, citing several cases in support of its contention – *In the Matter of Priamos, supra*, 3 Cal. State Bar Ct. Rptr. 824, *In the Matter of Wyshak* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 70, and *In the Matter of Spaith* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 511.

This matter was remanded to this court because the Review Department wanted to make sure Respondent be given an opportunity to contradict, temper, or explain the adverse evidence in the record. But after fiercely challenging the original hearing judge's application of collateral estoppel and contending that he was denied due process, Respondent did not add any new evidence or offer any witnesses to contradict, temper or explain the adverse evidence in the record at this new trial, which lasted only a few hours.

Accordingly, prior civil findings made under the preponderence-of-the-evidence standard of proof are entitled to a strong presumption of validity in State Bar proceedings if they are supported by substantial evidence. (See e.g. *Bernstein v. Committee of Bar Examiners* (1968) 69 Cal.2d 90, 101.)

After reviewing the voluminous documents and the testimonial evidence, the court finds, by clear and convincing evidence, that Respondent breached his fiduciary duties to James and abused his trust as her attorney. It is settled that an attorney-client relationship is of the very highest fiduciary character and always requires utmost fidelity and fair dealing on the part of the attorney. (*Beery v. State Bar, supra*, 43 Cal.3d at p 813.) The Supreme Court noted that"[t]he essence of a fiduciary or confidential relationship is that the parties doe not deal on equal terms, because the person in whom trust and confidence is reposed and who accepts that trust and confidence is in a superior position to exert unique influence over the dependent party." (*Id.*) "An attorney's violation of the duty arising in a fiduciary or confidential relationship warrants discipline even in the absence of an attorney-client relationship." (*Id.*)

James was a vulnerable woman with limited education and little business savvy. Respondent convinced her that the investment was ludicrous (14% interest) and short-term (three to four months). Attorneys are subject to discipline for inducing clients to invest in enterprises without fully apprising them of the risks. (*Beery v. State Bar, supra,* 43 Cal.3d. at p. 812.) Here, Respondent never told her anything about the nature of the risk involved. Rather, he concealed material facts from her regarding the investment in which he had interests through other entities whose business he conducted at his law practice. There was no real security for James' investment. Respondent utilized James' and others' investment funds and benefited himself with commissions and management fees at their expense. Consequently, she lost her life savings. James was severely harmed, physically, emotionally and financially, and ultimately, had to sue him. He has made only partial payment on the civil judgment and feels that she has been substantially compensated. Respondent clearly has shown no insight into his wrongdoing.

There are many cases in which the transaction in question was found not to be fair and reasonable that have resulted in disbarment or actual suspension. In *In the Matter of Priamos, supra,* 3 Cal. State Bar Ct. Rptr., the attorney engaged in business transactions with a client and committed acts of moral turpitude by his seven year self-dealing with over $500,000 of investment funds he was asked by his client to handle, which he paid himself nearly $450,000 in management and legal fees. The Supreme Court disbarred the attorney.

In *Beery v. State Bar, supra,* 43 Cal.3d 802, the attorney was actually suspended for two years because he abused the trust of his client who was unsophisticated in financial matters by soliciting $35,000 for a business

transaction without disclosing its risks. The attorney later defaulted to repay the loan. *Beery* is distinguishable, however.

The magnitude of the risk, concealment and self-dealing in this matter is greater than that in *Beery*. Here, Respondent had a lengthy history with and intimate knowledge of the Moro Landis investment and he was paid commissions and management fees of more than $244,000 at the expense of his investors. Also, *Beery* was sued by his former client but permitted a default judgment to be taken against him. Respondent herein heavily litigated the superior court case through appeal and attempted to have the judgment discharged in bankruptcy. *Beery* did not have the money to pay the judgment. Respondent has had the means to make restitution but now claims that his financial status has deteriorated. Finally, this case presents more substantial aggravating factors, although Respondent has more years of blemish-free practice than did *Beery*.

Respondent's failure to avoid adverse interests is similar to the wrongdoing committed in *Priamos*. Respondent clearly abused his client's trust and misrepresented to her about the investment.

It is well established that restitution in attorney disciplinary proceedings is not a form of debt collection nor is it used as a means of compensating the victim of wrongdoing. (See *In the Matter of Petilla* (May 14, 2001, case No. 96-O-05725) 4 Cal. State Ct. Rptr. ____.) Restitution is an important part of rehabilitation and public protection because it forces errant attorneys to confront, in concrete terms, the harm that their misconduct has caused. (*Brookman v. State Bar* (1988) 46 Cal.3d 1004, 1009.) Here, after more than nine years since the misconduct and more than seven years since the jury award in favor of James. Respondent has yet to recognize the harm he had

caused James. He has failed to fully satisfy the judgment and instead, believes that she has been well compensated. Rather than appreciating his wrongdoing, Respondent refuses to accept the decisions of the various courts and has constantly sought to delay the proceedings with appeals and motions for continuances.

Although Respondent had practiced law for 24 years at the time of his misconduct without any disciplinary record, "disbarment is not reserved just for attorneys with prior disciplinary records." (*In the Matter of Wyshak, supra,* 4 Cal. State Bar Ct. Rptr. 70, 83 [attorney practiced over 40 years without any prior discipline was disbarred].) A most significant factor is his complete lack of insight, recognition or remorse for any of his wrongdoing. The court is seriously concerned about the possibility of similar misconduct reoccurring. Respondent has offered no indication that this will not happen again. Moreover, the aggravating circumstances far outweigh any mitigation.

While the hearing judge in the original proceeding recommended three years of actual suspension, this court believes that the grave seriousness of Respondent's misconduct coupled with his lack of any meaningful regret, understanding, insight, or acceptance of any responsibility for the consequences of his misconduct demands a disbarment recommendation.

If this recommendation is accepted, Respondent will be required to bear the heavy burden of successfully pursuing a reinstatement proceeding in which he will have to prove by clear and convincing evidence his rehabilitation and fitness to practice prior to the Supreme Court certifying to the public his trustworthiness. Respondent's success in that proceeding will adequately provide for the public's protection. (*In the Matter of Priamos, supra,* 3 Cal. State Bar Ct. Rptr. 824.)

VI. RECOMMENDED DISCIPLINE

Accordingly, the Court hereby recommends that Respondent **BOLDEN BRUCE KITTRELL** be disbarred from the practice of law in the State of California and that his name be stricken from the rolls of attorneys in this state.

It is also recommended that Respondent be ordered to comply with the requirements of rule 955 of the California Rules of Court within 30 calendar days of the effective date of the Supreme Court order in this matter, and file the affidavit provided for in paragraph (c) of the effective date of the order showing his compliance with said order.

VII. COSTS

The Court recommends that costs be awarded to the State Bar pursuant to section 6086.10 and that those costs be payable in accordance with section 6140.7.

VIII. ORDER OF INACTIVE ENROLLMENT

It is ordered that Respondent be transferred to involuntary inactive enrollment pursuant to section 6007(c)(4) and rule 220(c) of the Rules of Procedure of the State Bar. The order of inactive enrollment shall become effective three days after service of this order.

Dated: December 20, 2001 s/_____
ROBERT M. TALCOTT
Judge of the State Bar Court

THE SUPREME COURT OF THE

STATE OF CALIFORNIA

In the Matter of	) Docket No. S104191
	)
BOLDEN B. KITTRELL	) State Bar Case No:
	) Case No.95-0-14321
	) 02-TE-10059-RMT
No. 40896	)
	) **VERIFIED PETITION**
A Member of the State Bar	) **FOR INTERLOCUTORY**
	) **REVIEW AND APPLI-**
	) **CATION FOR STAY**
	)
	) California Rules of Court
	) Rule 952(c)
	)
	)
_____	)

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Petitioner Attorney ***Pro Se***

I.
Introduction

This is a petition for interlocutory review pursuant to California Rules of Court Rule 952(c) to prevent a summary order on February 13, 2002 by a State Bar employee taking the petitioner attorney's thirty-five years license to practice law with no evidence. He previously took it ex parte on December 20, 2001 with no evidence. Exhibit A. The attorney has no prior record in thirty- five years of practicing law. This case concerns solely a civil suit about a failed investment brought by an investor.

This is the second trial on the identical issues. Petitioner previously filed his petition for interlocutory review with this Court following a finding of insufficiency of the evidence after the first trial. In the Matter of Kittrell, California Supreme Court docket no. S094082. From this Court's summary denial of review, the attorney filed with the United States Supreme Court for interlocutory review. In the Matter of Bruce Kittrell, United States Supreme Court, docket number 00-1873.

Throughout these proceedings the State Bar's judges failed to disclose that the constitutionality of the moral turpitude statute which is at issue was pending in the Ninth Circuit Court of Appeals, that the State Bar judges were defendants arguing for its constitutionality with the prosecutor, and that they share the same attorney. **Canatella v. State of California, Chairman of the Board of Governors of the State Bar, Judges of the State Bar Court, et al.** Ninth Circuit Docket no. 0016782, Northern District Docket Number 00105.

The State Bar's review department found after the first trial that the evidence was insufficient to sustain culpability

of the moral turpitude and business transaction charges.[1] It voided the recommended suspension. Instead of issuing an exoneration of the attorney, the State Bar's review department changed the moral turpitude charge.[2] It

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[1] The review department opinion states that, ""We... must reverse the hearing judge's factual findings regarding the 6106 [moral turpitude] violation" Exhibit B:18: para. 3:20-21," and "W]e cannot exercise our authority to independently review and reweigh the evidence in the James lawsuit under the clear and convincing standard of proof and make our findings with respect to the charged rule 3-300 violations. ... [We] reverse... and remand the matter for a new trial on the issue of respondent's culpability of former rule 3-300 violations." Exhibit B: 20: para. 1, 7-13. The opinion states that it is impossible to ascertain what facts support the moral turpitude and business transaction charges. Exhibit B: 4: para. 2, 13-23, 7: para. 3, 15-22, 8: 1-2. It states that , "..[N]one of the elements of a former rule3-300 (business transaction) violation are expressly addressed in the definitions given to the jury with respect to special finding 10 [the punitive damage instruction].... [T]he application of collateral estoppel does not establish that respondent violated former rule 3-300." Exhibit A:19: para. three; 25-26, 20: 1-2. The opinion states that the State Bar prosecutor "attempted to establish the charged 3-300 business transaction with client) and section 6106 (moral turpitude) violations solely through the application of collateral estoppel without presenting any references to the record or analysis showing where and how each element of the charged violations were found by the jury in the James lawsuit by clear and convincing evidence." It then states that, "We cannot determine the factual basis upon which the jury based its findings of malice, or oppression, or fraud, and whether it was based on fraud or breach of fiduciary duty. Nor can we determine the nature and extent of those acts by independently reviewing the record." Exhibit B:18: para 1, 6-13.

[2] The noticed moral turpitude charge was that, "Respondent knew or reasonably should have known that the facts concerning the aforesaid investment which he was concealing from James were material to her in making the investment decision and that she needed her funds returned to her in three or four months for investment into a condominium. By concealing from James, (sic) at the time she made the aforesaid investment, (sic) the true financial state of the asset into which

changed it to any punitive damage award in a civil suit is ipso facto an act of moral turpitude. It found automatic guilt without notice or a trial. It remanded to find the facts to support the guilt finding already made of its unnoticed moral turpitude charge and for a second trial on the business transaction charge, even though it admitted that the prosecutor had failed to carry his burden of proof on either charge. The review department of the State Bar also ruled that the petitioner was properly excluded from defending on a claim to collateral estoppel to a civil suit. Refer footnote 1. The civil suit was tried on a preponderance of the evidence burden of proof. Attorney disciplinary proceedings require a higher burden of proof. The civil suit never mentioned moral turpitude nor a business transaction rule. In re: Kittrell, California Supreme Court docket number S094082.

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she was investing her funds, Respondent engaged in an act of moral turpitude as set forth in …section 6106." NDC:count three: 7: 23-27, 8:1-5. The review department without notice after trial changed this moral turpitude charge to "We conclude that an attorney's guilt of malice, oppression, or fraud as those terms were defined for the jury in the James' lawsuit, with respect to any attorney's breach of fiduciary duty to either a client or a non-client involves moral turpitude in violation of section 6106 as a matter of law." The opinion states that, "We conclude that the commission of any of these acts involves moral turpitude in violation of section 6106." Exhibit B: 8. It states that, "However, under the circumstances and record in this proceeding, the application of those principles does not establish the nature and extent of those acts. Nor the application of those principles establish that respondent violated former rule 3-300." The remand order states, "Applying principles of collateral estoppel, we conclude that Bolden Bruce Kittrell is culpable of violating Business and Professions Code section 6106 .we order that this matter be remanded to the hearing department for a new trial on the following issues: (1) findings of fact surrounding respondent's violation of Business and Professions Code section 6106" Exhibit B: 24.

From the summary denial of review by this Court, the petitioner filed with the United States Supreme Court. In the Matter of Bruce Kittrell, United States Supreme Court, docket number 00-1873, In the Matter of Bruce Kittrell, California Supreme Court, docket no. no. S094082

The constitutional issues which were presented to this Court and then to the United States Supreme Court are whether a punitive damage award in a civil suit is ipso facto an act of moral turpitude, whether double jeopardy or due process of law prevent the re-trial, whether the act of moral turpitude statute is unconstitutional for over breadth and as applied to a punitive damage award in a civil suit, whether the finding of insufficiency of the evidence required an order exonerating the attorney, whether an attorney may be denied his right to defend on a claim to application of collateral estoppel to a civil suit when the two proceedings require different burdens of proof and have dissimilar issues, and whether a dismissal of the proceeding is required as the review department was prohibited from changing the moral turpitude charge after the trial was over and when it is prohibited from summarily finding guilt of an new unnoticed moral turpitude charge. After four months the United States Supreme Court denied interlocutory review. In the Matter of Bruce Kittrell, United States Supreme Court, docket number 00-1873.

At the second State Bar trial no evidence was presented.[3]

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[3] The Decision on Remand and Involuntary Inactive Enrollment Order issued by the second hearing judge on December 20, 2001 which is attached as Exhibit A states at 2:14-15 that, "The following findings of fact and conclusions of law are based on the evidence admitted at the prior hearing (sic- the first trial). No additional evidence was submitted at this hearing.." Thereafter the second hearing judge adopted the same findings which had already been overruled by the review department which found that they were insufficient evidence of culpability of the charges. He stated that, "The second hearing judge adopted the exact

The second hearing judge recommended disbarment. He ex parte took the attorney's thirty-five year license to practice law the same day. Exhibit A. The petitioner attorney secured the voiding of the ex parte order. The second hearing judge will now decide on February 13, 2002 whether to reinstate his taking of the attorney's thirty-five year license summarily. At issue is the unconstitutionality of the Involuntary Inactive Enrollment Statute facially and as applied.

The Order on Remand and Involuntary Inactive Enrollment Order issued by the second hearing judge is attached as Exhibit A. The Review Department's Opinion on Review finding an insufficiency of the evidence to support the moral turpitude and business transaction charges, changing the moral turpitude charge, finding that any punitive damage award is ipso facto an act of moral turpitude, finding guilt of its brand new moral turpitude charge, and remanding to find the facts to support the guilt finding already made is attached as Exhibit B. The motion to dismiss the involuntary inactive enrollment proceeding filed with the second hearing judge and still pending without any determination even though the attorney requested a ruling by January 28, 2002 in order to secure constitutional review prior to the taking is attached as Exhibit C. The Motion for Stay filed with the Review Department is attached as Exhibit D.

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same words, sentences, periods, commas and spelling errors of the first hearing judge's facts and findings that had already been reversed. He stated that, "The court further concludes that the findings of fact and conclusions of law in the original hearing decision filed March 18, 1999, including the facts surrounding Respondent's violation of ... section 6106, should be and are fully adopted and therefore, are hereby set forth as follows: (thereafter follows the identical wording of the first hearing judge's findings which were already reversed by the reviews department)." Exhibit A:3:17-26, 4-14.

References to "Decision" or "Dec." refers to the second hearing judge's Order on Remand and Involuntary Inactive Enrollment order that is Exhibit A. References to "Opinion" or "Open." refers to the Review Department reversal order that is Exhibit B. References to "Section[s]" refers to sections of the California Business and Professions Code. References to "Rules" refers to the State Bar Rules of Procedure.

II.

United States Constitutional Issues Presented

The United States Constitutional issues presented are the following:

1. Whether an attorney's license may be taken with admittedly no evidence?
2. Whether an attorney may be subject to a second trial after a finding that the prosecutor in an attorney disciplinary proceeding failed to present sufficient evidence of culpability after the first trial?
3. Whether the change in the moral turpitude charge after trial renders the proceedings unconstitutional pursuant to **In re Ruffalo** (1968) 390 U.S. 544, 88 S. Ct. 1222, 20 L. Ed. 117?
4. Whether the act of moral turpitude statute violates the first amendment to the United States Constitution as an overly broad statute?
5. Whether the act of moral turpitude statute is unconstitutional for violating the first and fifth amendment rights to freedom of speech and fair notice when it is claimed that a punitive damage award is ipso facto an act of moral turpitude?
6. Whether an attorney's license may be taken when he has been barred from defending on a claim that collateral estoppel applies to a disciplinary proceeding from a civil suit whose merits were tried

on a lower burden of proof than that required for the disciplinary proceeding and when the issues are different?

7. Whether the summary taking of a license to practice law by a State Bar employee denies to the attorney the equal protection of state law that guarantees that the attorney is entitled to action by his licensing court prior to a taking?
8. Whether the involuntary inactive enrollment statute is an unconstitutional bill of attainder?
9. Whether the fact of no post-taking final adjudication has ever occurred or can occur for at least two years to over five years renders the summary taking unconstitutional as a denial of fundamental due process of law?
10. Whether the standard for a summary taking of possibility of success and threat to interests of the public is unconstitutional as lacking the substantive exigency required for a summary taking?
11. Whether the summary taking of a license granted by a State Supreme Court by a State Bar employee is the unlawful delegation of judicial power to a private person in violation of the due process clause of the United States Constitution?
12. Whether this Court's decision in **Conway v. State Bar** 47 Cal. 3d 1107; 767 P.2d 657; 255 Cal. Rptr. 390; 80 A.L.R.4th 101 (1989) concerning a summary taking by a State Bar employee of a license on ten days notice, no rights to confrontation, no rights to cross-examination, a single referee, hearsay and affidavits as evidence, and switching the burden of proof to the accused attorney is a violation of the due process and equal protection clauses of the United States Constitution?

13. Whether the acknowledgement of no permitted review by this Court of proposed suspensions or disbarments of attorneys as set forth in **In re Rose** (2000) 22 Cal.4th 430, 93 Cal.Rptr.2d 298; 993 P.2d 956 (Mar. 6, 2000) is unconstitutional for unlawfully delegating judicial power over a State's Court officers to private persons in violation of the due process clause to the United States Constitution and the civil rights of attorneys who relied on licensing by a constitutional court of law?
14. Whether the increase in punishment with no evidence following reversal is an unconstitutional vindictive sentencing in violation of **North Carolina v. Pearce** 395 U.S. 711 (1969)?
15. Whether the lack of a fair and impartial adjudicator renders the involuntary inactive enrollment state unconstitutional ?

All of these fifteen United States constitutional issues fall within the ambit of review of California Rules of Court Rule 954 specifying the grounds upon which this Court may grant review to an accused attorney. The State Bar is acting without or in excess of its constitutional jurisdiction. There was no fair hearing. There is no support in any evidence for the proposed summary taking. The summary discipline is not appropriate, as the attorney is entitled to an order exonerating him of the charges.

III.

A Taking of a License with No Evidence is Unconstitutional

The second hearing judge admitted there was no evidence presented. Refer Exhibit A and footnote 3. Yet he recommends disbarment and ex parte takes the

attorney's thirty-five year license to practice law when the attorney has no prior record. Exhibit A. Governor Davis' appointee to the State Bar has politicized the process of suspensions and disbarments by taking licenses on whim.

The taking of a license without any evidence violates due process of law. When a prosecutor conducts a trial and has failed to prove his case, a judgment of acquittal is required. See **In re Ruffalo, In re Primus** 436 U. S. 412.

The fact that it is customary for the State Bar to recommend disbarment and ex parte take the license of an attorney who raises any issues about it acting unconstitutionally is not evidence. The State Bar often succeeds in causing the attorney's death, so the issues are moot, but that does not render their proceedings constitutional.[4] Vindictive acts of lawlessness, even if customary, do not constitute evidence so as to convict. As

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[4] The many deaths caused by the State Bar of California since this Court delivered attorney licensing to it are described in a book entitled "The Deadliest Bar" being published next year. Two deaths from the State Bar's misapplication of the involuntary inactive statute and the moral turpitude statute illustrate the deadly nature of the delegation of this Court's judicial power to the private persons at the State Bar. Attorney Phillip McNamee, a devout Roman Catholic lawyer for fifty years with no prior record, suffered a heart attack when he left this Court after learning that a State Bar employee had behind his back ex parte rendered him inactive because he had a pending legal malpractice case against him. A State Bar employee thought he should try the civil law suit instead. After a quintuplet heart by-pass to attempt to save Attorney McNamee's life, he died. Attorney James McDaniels was an attorney for thirty years with no prior record. He shot and killed himself the morning of his State Bar hearing when the State Bar was recommending his disbarment for having sex with clients. This was claimed to be moral turpitude. The rule prohibiting sex with a client was not in effect. The State Bar proceeding was ex post facto. It was required to be dismissed. Instead Attorney McDaniels was tortured and defamed by the State Bar's press mania for over two years and its lawlessness until he was driven to kill himself.

held in **Taylor v. Louisiana** 370 U.S. 154 (1962) custom is not evidence, and a conviction based on custom and not evidence is unconstitutional.

The accused does not have the burden of proving his innocence. He isn't guilty because he puts on no evidence. As held in **Johnson v. Florida** 391 U.S. 596 (1968) "The prosecution emphasized that appellant had failed to account for any 'lawful purpose' during the time he sat on the bench for some three hours. The burden, however, is on the State to prove that an accused has committed an act bringing him within a ...statute." **Thompson v. Louisville** 362 U.S. 199. Since the prosecutor had the burden of proving by clear and convincing evidence that the attorney committed an act of moral turpitude and that the attorney engaged in a business transaction with a client, his failure to introduce any evidence required a finding exonerating the attorney of those charges. The prosecutor was required to present convincing proof to a reasonable certainty and reasonable doubts were required to be resolved in favor of the accused. **Himmel v. State Bar** (1971) 4 Cal.3d 786, 794, 94 Cal Rptr. 825, 484 P.2d 993; **Zitney v. State Bar** (1966) 64 Cal. 2d 787, 789-790, 51 Cal. Rptr. 825, 415 P.2d 521.) [R]easonable doubts must be resolved in favor of the attorney. **Price v. State Bar** (1982) 30 Cal 3d 537, 547; **Emslie v. State Bar** (1974) 11 Cal 3d 210, 226. All reasonable doubts are to be resolved in favor of the attorney. (**Alberton v. State Bar** (1984) 37 Cal.3d 1, 11-12 [206 Cal.Rptr. 373, 686 P.2d 1177, A.L.R.4th 1487].) "[A]ll reasonable doubts in favor of the accused [must be made] and if equally favorable inferences may be drawn from a proved fact, the inference which leads to a conclusion of innocence rather than one leading to a conclusion of guilt will be accepted." (**Lee v. State Bar**, **supra**, 2 Cal.3d at p.

939; see also **Zitny v. State Bar** (1966) 64 Cal.2d 787, 790; cf. **Lubetzky v. State Bar, supra**, 54 Cal.3d at 318).

The decision recommending disbarment, the ex parte taking the attorney's license, and proposing doing it again on February 13, 2002 has no evidence to support it. This requires that the proceeding be dismissed. It violates due process of law to find guilt and take the liberty and property of an attorney with no evidence.

IV.
Double Jeopardy and Due Process Prohibited The Second Trial

The petition should be entertained to decide whether the threatened summary taking of the attorney's license must be voided. The summary taking is premised on a recommendation of disbarment following the second trial. Since the second trial was constitutionally prohibited, the proceedings are patently unconstitutional.

A. The Punishment Purpose Renders Double Jeopardy Applicable

While this Court has held that double jeopardy does not apply to State Bar proceedings, **Crooks v. State** (1989) 275 Cal. Rptr. 420, at 427, the United States Supreme Court has not dealt with this issue. As held by the United States Supreme Court in **In re Ruffalo** (1968) 390 U.S. 544, 550-551; 88 S. Ct. 1222; 20 L.Ed. 2d. 117. attorney disciplinary proceedings are quasi-criminal. The United States Supreme Court dealt with the application of the double jeopardy clause to another quasi-criminal proceeding, to wit, juvenile court dependency court proceedings. In **Swisher v. Brady** (1978) 438 U.S. 204, it stated that, "The general principles governing this case are well established. A State may not put a defendant in jeopardy twice for the same offense. **Benton v. Maryland**, 395 U.S. 784. The

constitutional protection against double jeopardy unequivocally prohibits a second trial following an acquittal. The public interest in the finality of criminal judgments is so strong that an acquitted defendant may not be retried even though 'the acquittal was based upon an egregiously erroneous foundation.' . . .(At 214). Because jeopardy attaches before the judgment becomes final, the constitutional protection also embraces the defendant's 'valued right to have his trial completed by a particular tribunal.' . . . Consequently, as a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial. **Arizona v. Washington,** (1978) 434 U.S. 497, 503-505." A civil monetary penalty that is sufficiently disproportionate to the harm caused to the government was punishment for double jeopardy purposes. **United States v. Halper** (1989) 490 U.S. 435. The Supreme Court held in **Halper** that a civil penalty is punishment if it "cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving a retributive or deterrent purposes." 490 U.S. at 448. A sanction that is designed, even in part, to deter or punish will constitute punishment, regardless of whether it also has a remedial purpose. **United States v. $405,089.23 U.S. Currency** (9th Cir. 1994) 33 F 3d 1210, 1219. While the stated purpose of attorney disciplinary purposes is not to punish the attorney, but is remedial, in this case it is punishment that is at issue rendering the proceedings a probable violation of the double jeopardy clause.

The review department's opinion asserts that punitive damages in a civil suit are *ipso facto* an act of moral turpitude and thus, an act of professional misconduct.. As stated by the United States Supreme Court in **Washington Gaslight Co v. Lansden** (1899) 172 U.S. 534, "Punitive damages are damages beyond and above the amount which

a plaintiff has really suffered, and they are awarded upon the theory that they are a punishment to the defendant, and not a mere matter of compensation for injuries sustained by plaintiff."

When punitive damages from a civil suit are used to find culpability, and the purpose of such money damages are punishment and deterrence, the remedial purpose of this proceeding is absent. It is pure punishment. It thus falls within the double jeopardy principles prohibiting remand for a new trial and requires an order exonerating the accused of the moral turpitude and business transaction charges.

A central purpose "of the prohibition against successive trials" is to bar "the prosecution [from] another opportunity to supply evidence which it failed to muster in the first proceeding." **Burks v. United States**, (1978) 437 U.S. 1, 11. The double jeopardy clause also precludes the prosecutor from "enhanc[ing] the risk that an innocent defendant may be convicted." **Arizona**, at 504. It prohibits unfairly subjecting the defendant to the embarrassment, expense, and ordeal of a second trial. **Green v. United States** (1957) 355 U.S. 184. See also **Breed v. Jones**, (1975) 421 U.S. 519. As stated in **United States v. Jenkins** (1975) 420 U.S. 358 at 370, "[I]t is enough for purposes of the double jeopardy clause . . . that further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged, would have been required upon reversal and remand. Even if the District Court were to receive no additional evidence, it would still be necessary for it to make supplemental findings . . . . [To do so] would violate the double jeopardy clause."

B. Due Process of Law Prohibited The Successive Prosecutions for the Same Alleged Offense

"The states have the power to control the practice of law in their courts. However, that power may not be exercised so as to ignore federally protected rights." **NAACP v. Button** (1963) 371 U.S. 415, 439; 83 S. Ct. 328; 9 L.Ed. 2d. 405. "Procedural due process, ...is a federally protected right of an attorney." **In re Ruffalo** at 550. Successive or duplicative prosecutions, separate and apart from double jeopardy considerations, offend the basic precepts of due process of law and are unconstitutional. **Blockburger v. United States** (1932) 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306, 309 and **United States v. Dixon** (1993) 509 U.S. 688; 113 S. Ct. 2849; 125 L. Ed. 2d 556. Since the second trial was unconstitutional, the recommendation following the second trial, the ex parte taking, and the proposed summary taking of the attorney's license to practice law is patently unconstitutional.

V.

The Change in the Moral Turpitude Charge After Trial Requires Dismissal of the Proceeding

As held by the United States Supreme Court in **In re Ruffalo** at 551, "The charge must be known before the proceedings commence." When the review department changed the moral turpitude charge from the noticed charge of concealing facts from an investor to a punitive damage award in a civil case being automatically an act of moral turpitude, refer footnote 2, this required the immediate dismissal of the proceeding for unconstitutionality as set forth by the United States Supreme Court in **In re Ruffalo.** As such, the second trial, disbarment recommendation, ex parte taking, and proposed summary taking of the attorney's license to practice law are patently unconstitutional.

VI.

Act of Moral Turpitude is Unconstitutionally Vague and Over Broad

Since the act of moral turpitude statute is patently unconstitutional for over breadth and for vagueness as applied to a punitive damage award in a civil suit, the recommendation of disbarment, the ex parte taking, and the proposed taking of the attorney's license to practice law for having a punitive damage award is unconstitutional. The pending Ninth Circuit case, Canatella, presents clearly the unconstitutionality of the moral turpitude statute for over breadth as chilling, quashing, and punishing freedom of speech as a claimed act of moral turpitude.

The moral turpitude statute states that "The commission of an act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his (or her) relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension." Section 6106. Moral turpitude has been rejected by the American Bar Association as a grounds for attorney discipline. The American Bar Association stated that "the Model Rules also eliminate the troublesome `moral turpitude standard... This standard has been broadly defined As 'an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow men, or to society in general, contrary to the accepted and customary rule of right and duty between man and man.' That the standard was manifestly ambiguous is evidenced by the wide ranging interpretations given it by the courts." A.B.A. Annotated Model Rules, Rule 8.4, Misconduct, Comment, at 353.

A. Moral Turpitude is Unconstitutional for Over Breadth

The moral turpitude statute is void for over breadth. The vagueness doctrine is a due process concept. It implements principles of fair warning and non-discriminatory enforcement. A vague law may trap law-abiding citizens by not providing fair notice of what is prohibited. **Papachristou v. City of Jacksonville** 405 U.S. 156 (1972); **United States v. Harriss** 347 U.S. 612, 617 (1954). It also provides an opportunity for arbitrary and discriminatory enforcement. Those who apply the law have no clear and explicit standards to guide them. **Coates v. Cincinnati**, 402 U.S. 611, 614 (1971), **Shuttlesworth v. Birmingham** 382 U.S. 87, 90-91, 15 L. Ed.2d 176 (1965).

As held in **Terminiello v. Chicago**, 337 U.S. 1 (1949) at 4, 'The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes. ...Accordingly a function of free speech under our system of government is to invite dispute . ... Speech is often provocative and challenging . . .. That is why freedom of speech though not absolute, (citation omitted)... is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest."

When a vague statute "abut[s] upon sensitive areas of First Amendment freedoms,' it 'operates to inhibit the exercise of [those] freedoms.' Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked." **Grayned v. City of Rockford** 408 U.S. 104, 109 (1972), quoting **Baggett v. Bullitt** 377 U.S. 360, 372 (1964), and **Speiser v. Randall** 357 U.S. 513, 526

(1958). A statute that abuts upon first amendment freedoms is unconstitutionally over broad when it "sweep[s] unnecessarily broadly and thereby invade[s] the area of protected freedoms." **Zwickler v. Koota** 389 U.S. 241, 250 (1967), quoting **NAACP v. Alabama** 377 U.S. 288, 307 (1964). A vague statute is overbroad when its uncertain boundaries leave open the possibility of punishment for protected conduct and thus lead citizens to avoid such protected activity in order to steer clear of the uncertain proscriptions. **Grayned** at 109; **Dombrowski v. Pfister** 380 U.S. 479, 486 (1965).

The review department opinion indicates that the attorney's speech is sought to be punished by the application of the moral turpitude statute. It states that moral turpitude is "any act of baseness, vileness, or depravity." **In re Craig** (1938) 12 Cal.2d 93, at 97. Exhibit B:. 16, para 1, 20-23. It indicates that this Court has never placed any limiting definitions or instructions on the application of the statute. Exhibit B. The lack of any limitation on the act or moral turpitude statute by this Court indicates that the statute is required to be held unconstitutional for over breadth.[5]

With punitive damages being permitted to be imposed for speech that is oppressive, malicious, or fraudulent,[6] it is

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[5] Unlike **Chaplinsky v. New Hampshire** 315 U.S. 568 (1942), this Court has never held moral turpitude is limited to fighting words.

[6] In **Smith v. Wade** (1983) 461 U.S. 30, the United States Supreme Court stated at 38, 'Malice,' as used by courts and lawyers in the last century, was a hopelessly versatile and ambiguous term, carrying a broad spectrum of meanings..... [T]here was significant variation ...among American jurisdictions in the latter 19th century on the precise standard to be applied in awarding punitive damages-variation that was exacerbated by the ambiguity and the slipperiness of such common terms as 'malice' and 'gross negligence.' ...[T]he rule in a large majority of

jurisdictions was that punitive damages...could be awarded without a showing of actual will, spite, or intent to injure..(at p.44) ... Most cases under state common law,...recognized that punitive damages in tort cases may be awarded not only for actual intent to injure or evil motive, but also for recklessness, serious indifference to or disregard for the rights of others, or even gross negligence." The malice definition given to the jury in this case that it "means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard for the rights of others. Exhibit B:15:ft.7. "Despicable" as set forth in the Microsoft Word for Windows 98 Thesaurus has synonyms of "abject," with a number of possible definitions including "the most contemptible kind or basely cowardly;" "base," "low, "low-down;" "miserable," "pathetic," "pitiable;" "pitiful," "vile." The jury was instructed on "Oppression" that it meant "despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights." Exhibit B: ft. 7. "Cruel" means "heartless," "deficient in kindness or compassion or mercy," "Able or disposed to inflict pain and suffering," "causing suffering and pain, "causing suffering." " The jury was instructed that "despicable conduct" meant "conduct which is so vile, base, contemptible, miserable, wretched or loathsome that it would be looked down upon and despised by ordinary decent people." Exhibit B: 15, ft. 7. "Vile" has synonyms of "abhorrent,?""bestial," "despicable," "detestable," "disgusting," "distasteful," "egregious," "flagrant," "foul," "ghastly," "ghoulish," "gross," "hideous," "horrid," "loathsome," "morbid," "nauseating," "nauseous," "objectionable," "obnoxious," "obscene," "repugnant," "repulsive," "revolting," "unpleasant," "verminous," or "yucky" with adjective meanings of "causing or able to cause nausea," "of the most contemptible kind," "morally reprehensible," or "thoroughly unpleasant." "Base" has definitions of "morally reprehensible," "not of the nobility," and an archaic meaning: "of the most contemptible kind." The jury was further confused as the punitive damage instruction implied that those damages should be imposed on the attorney as he was a real estate broker, even though in the investment transaction involved, he was not acting as a real estate broker. Thus, the jury was instructed on the Breach of Fiduciary Duty cause of action that, ?A fiduciary or a confidential relationship exists whenever under the circumstances trust and confidence reasonably

the attorney's freedom of speech that is being punished without a compelling state interest or a narrowly drafted statute. The moral turpitude statute is "'as authoritatively construed...susceptible of application to speech, although vulgar or offensive, that is protected by the First and Fourteenth Amendments.' **Gooding v. Wilson** 405 U.S. 518, 520 (1972). "It matters not that the words [the speaker] used might have been constitutionally prohibited under a narrowly and precisely drawn statute." Ibid. In the area of free speech, the value of protected expression justifies "attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity." **Dombrowski** at 486. The specific conduct involved is thus not relevant. "It is the ordinance on its face that sets the standard of conduct and warns against transgression. The details of the

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may be and is reposed by one person in the integrity and fidelity of another. A fiduciary relationship arises in, among other situations, the relationship between an attorney and client, the relationship between a real estate broker and lender or borrower. Exhibit 624 contained in the State Bar's July 28, 1997 filed, endorsed "Submission of Jury Instructions Given in James v. Kittrell, O,C.S.C. Case No. 78730 filed with the Hearing Department by the Office of Trials. The punitive damage instruction stated that if the jury found there was oppression, malice, or fraud in the conduct of either a breach of fiduciary duty or fraud that such damages could be awarded. Exhibit B: 15: ft.7. With the misleading jury instruction on breach of fiduciary duty, and the probability that punitive damages were imposed because the attorney is a real estate broker, nothing clear and convincing can be derived from the punitive damage award. The variable meanings to the terms involved in the punitive damage instructions could cause a jury to impose them because the defendant is a real estate broker who committed said words that were yucky.

offense could no more serve to validate this ordinance than could the details of an offense charged under an ordinance suspending unconditionally the right of assembly and free speech." **Coates** at 616.

Inasmuch as the act of moral turpitude statute is facially overly broad, the proceeding recommending disbarment, the ex parte taking of the attorney's license, and the proposed summary taking of said license on February 13, 2002 is unconstitutional.

B. Moral Turpitude is Unconstitutional for Vagueness as Applied

"Legislation ... run[s] afoul of the due process clause because it fails to give adequate guidance to those who would be law-abiding, to advise defendants of the nature of the offense with which they are charged, or to guide courts in trying those who are accused." **Musser v. Utah** 333 U.S. 95, 97 (1948). ' 'Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warnings. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory applications." **Grayned**, quoted in **Village of Hoffman Estates v. The Flipside** 455 U.S. 489, 498.

'There must be ascertainable standards of guilt. Men of common intelligence cannot be required to guess at the meaning of the enactment. The vagueness may be from

uncertainty in regard to persons within the scope of the act . . . or in regard to the applicable tests to ascertain guilt." **Winters v. New York** 333 U.S. 507, 515-516 (1948). Cf. **Colten v. Kentucky** 407 U.S. 104. 110(1972). Statutes that lack the requisite definiteness or specificity are "void for vagueness." **Papachristou, Smith v. Goguen** 415 U.S. 566(1974), **Thornhill v. Alabama** 310 U.S. 883, **United States v. National Dairy Corp.** 372 U.S. 29 (1963), **Lanzetta v. New Jersey** 306 U.S. 451(1939), and **Connally v. General Construction Co**. 269 U.S. 385 (1926).

Act of moral turpitude has no core. It is inherently vague and ambiguous, such that the proceeding here applying said statute to assert that a punitive damage award in a civil suit is ipso facto an act of moral turpitude which is an unprecedented interpretation is void for vagueness as applied.

VII.

Finding Guilt without a Trial Is Unconstitutional

As set forth in footnote 2, the review department found guilt of its new unnoticed moral turpitude charge without a trial. By conclusively finding guilt by asserting that any punitive damage award is ipso facto an act of moral turpitude, the review department violated the orders of the United States Supreme Court in **Saunders v. Shaw** (1917) 244 U.S. 317. In **Saunders** a State Supreme Court reversed a case and rendered judgment absolute against the party who succeeded in the trial court upon a proposition of fact which was ruled to be immaterial at the trial and concerning which the party had no proper opportunity to introduce his evidence. This rendering of a decision on an issue not properly pled, raised, or tried compelled reversal of the Supreme Court decision. Likewise, the review department's opinion concluding that the attorney committed

an act of moral turpitude based on facts never alleged and not found when admittedly the facts pled in support of the act of moral turpitude noticed charge were not supported by evidence requires an order exonerating the attorney of the moral turpitude charge.

VIII.
Barring the Attorney Defending Himself is Unconstitutional

Barring the attorney defending himself in both trials is unconstitutional. To apply collateral estoppel to bar defense, the issues must be identical, the burden of proof must be the same, and the purposes of the two proceedings must be similar.

A. There Was no Same Issue

The United States Supreme Court had held that collateral estoppel may not be applied except when "The matter raised in the second suit must be identical in all respects to that decided in the first proceeding and where the controlling facts and applicable legal rules remain unchanged." **Tait v. Western Md. R. Co.** 289 U.S. 620 (1933). Its decisions have stated that the application of collateral estoppel requires an identical issue (**Tait**); a point actually litigated and determined (**Cromwell v. County of Sacramento** 94 U.S. 351, 352-353 quoted in **Partmar v. Paramount Corp.** (1954) 347 U.S. 89, at 91); a matter actually presented and determined (**United States v. International Building Co.**, 345 U.S. 502, 506 (1953); an issue actually litigated and determined (**Lawlor v. National Screen Service** (1955) 349 U.S. 322; a determination of fact or of mixed fact and law essential to the decision (**Commissioner v. Sunnen** 333 U.S. 591, 601 (1948); an ultimate fact (**Commissioner** at 600); an issue necessarily resolved in the first proceeding (**One Lot Emerald Cut Stones v. United States** (1972) 409 U.S. 232; an issue

actually and necessarily determined **(Montana v. United States** (1979); or a right, question or fact distinctly put in issue and directly determined (**Southern Pacific R. Co. v. United States** 168 U.S. 1, 48-49 (1897). .

Since an act of moral turpitude was never presented to the civil jury nor any claimed definitions of such a term and punitive damages are imposed under elasticized meanings of malice, oppression, or fraud which permits a jury to find punitive damages based on solely an act that is yucky, the application of collateral estoppel to bar defense of the merits to an accused in an attorney disciplinary proceeding based on indefinite damage findings in a civil trial offends the precepts of fairness intrinsic to the concept of due process of law.

B. The Disciplinary Proceeding Required a Higher Burden of Proof

The fact that collateral estoppel may never apply when the suit being sought to be recognized is tried on a lower standard of proof than that required for a finding in the second proceeding means that the application of collateral estoppel to bar the attorney's defense was constitutional error requiring a dismissal of the proceeding. The civil merits were tried on a preponderance of the evidence. Proof in this attorney disciplinary proceeding required clear and convincing evidence. Since the prosecutor presented no evidence, the proceeding was patently unconstitutional. As held in **Grogan v. Garner** (1991) 498 U.S. 279, at 285, the United States Supreme Court has held that if the issue of fraud is tried based on a burden of proof of preponderance of the evidence, and the clear and convincing standard applies [to the instant case]..., the prior judgment could not be given collateral estoppel effect.

C. Civil Cases and Disciplinary Proceedings Have Different Purposes

As stated in **Most v. State Bar** (1967) 67 Cal. 2d. 589, 595, fn. 5, the purpose of civil proceedings and State Bar proceedings is not the same. This Court held in **Bernstein v. Committee of Bar Examiners** (1968) 69 Cal. 2d. 90, at 101, "The findings in the civil action are not binding upon this court. (cf. **Lefner v. State Bar**, 64 Cal.2d 189, 192, 49 Cal. Rptr. 296, 410 P.2d 832. The following cases of this Court establish that civil findings are not binding in State Bar proceedings: **Maltaman v. State Bar** (1987) 43 Cal. 3d. 924, **Rosenthal v. State Bar** (1987) 43 Cal. 3d. 612, 634, **Mushrush v. State Bar** 17 Cal. 3d. at 489, fn. 1, **Yokozeki v. State Bar** 11 Cal. 3d. At 444; **In re Wright** (1973) 10 Cal. 3d. 374, 377; **Lee v. State Bar** (1970) 2 Cal. 3d. 927, 941; **Bernstein v Committee of Bar Examiners** (1968) 69 Cal. 2d. 90, 101; **Lefner v. State Bar** (1966) 64 Cal. 2d. 189, 192; **Magee v. State Bar** (1962) 58 Cal. 2d. 423, 429. The issues are not the same nor are the parties to the proceedings.

In determining that collateral estoppel does not apply in State Bar proceedings to preclude the accused attorney defending his license to practice law based on civil law findings, this Court analyzed the disparity and differences in the two proceedings and why collateral estoppel should not be applied in an attorney disciplinary proceeding in **Maltaman**, supra, at 947, as follows: "The State Bar Court noted the civil determination that petitioner committed fraud and undue influence in the Spang case, but the civil verdict and judgment have no disciplinary significance apart from the underlying facts.....`[S]ubstantial evidence to support the civil judgment is not necessarily `convincing proof . . . to

a reasonable certainty, which we must find in order to impose discipline."

The purpose of an attorney disciplinary proceeding is to determine whether an attorney has violated rules of professional conduct and whether he should be sanctioned concerning his right to work as a result in order to protect the public from an unfit practitioner. The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, to preserve public confidence in the profession, and to maintain the highest possible professional standards for attorneys. (**Chadwick v. State Bar** (1989) 49 Cal 3d 103, 111; **Cooper v. State Bar** (1987) 43 Cal 3d 1016, 1025; standard 1.3). While the purpose of attorney disciplinary proceedings is not to punish the attorney, the purpose of punitive damages is exactly the opposite, to wit, to punish the defendant. The United States Supreme Court has held that punitive damages "are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." **Gertz v. Robert Welch, Inc.**, (1974) 418 U.S. 323, 350, **Electrical Workers v. Fount** (1979) 442 U.S. 42. Since the purpose of the punitive damage award in a civil proceeding upon which the Opinion asserts it finds conclusively, without a trial or hearing, an act of moral turpitude, is exactly the opposite of the purpose of the attorney disciplinary proceedings and the finding of an act of moral turpitude, the claim of collateral estoppel is unconstitutional as the purpose behind the two issues is exactly the opposite of each other.

IX.
The Involuntary Inactive Enrollment Statute is an Unconstitutional Bill of Attainder

A bill of attainder is "a legislative act which inflicts punishment without a judicial trial." See **Cummings v. State of Missouri** 71 U.S. 277 (1866). The taking of a license to practice law is a punishment. **Ex Parte Garland** 4 Wall. 333, 379. As held in **In re: Ruffalo** (1968) 390 U.S. 544, 88 S. Ct. 1222, 20 L. Ed. 117, at 550, "Disbarment, designed to protect the public, is a punishment or penalty imposed on a lawyer.... These are adversary proceedings of a quasi-criminal nature. Cf. **In re Gault**, 387 U.S. 1, 33." See also **Spevack v. Klein** 385 U.S. 511, 515. He is accordingly entitled to procedural due process, which includes fair notice of the charge. See **In re Oliver** 333 U.S. 257, 273.

The taking of the attorney's license by purporting to enroll him as an inactive member of the Bar is an unconstitutional bill of attainder.[7] As held in **California**

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[7] Former section 6007(c)(1) states, "The Board may order the involuntary inactive enrollment of an attorney upon a finding that the attorney's conduct poses a substantial threat of harm to the interests of the attorney's clients or to the public." The threat of harm requirement mandates that three findings be made: (A) The attorney has caused or is causing substantial harm to the interests of the attorney's clients or to the public, (B)(1) The attorney's clients or the public are likely to suffer greater injury from the denial (of the order) than the attorney is likely to suffer if it is granted, or B2) there is a reasonable likelihood that the harm will reoccur or continue, and C) There is a reasonable probability that the State Bar will prevail on the merits of the underlying matter." A recommendation of disbarment creates a rebuttable presumption that the factors are established. The presumption is one affecting the burden of proof as defined in Section 605 of the Evidence Code. The statute also provides that, "Where the evidence establishes a pattern of behavior, including acts likely to cause

State Employees' Assn. v. Flournoy 32 Cal.App.3d 219 (2nd Dist., Div. 3 1973), "The United States Constitution provides that `No Bill of Attainder ... shall be passed' (U.S. Const., art. I, § 9) and that `No State shall ... pass any bill of attainder' (U.S. Const., art. I, § 10). The Constitution of the State of California likewise states that `No bill of attainder ... shall ever be passed.' (Cal. Const., art. I, § 16.) ...Historically, a bill of attainder was a legislative act which, without a judicial trial, decreed punishment of death with consequences of forfeiture of property and `corruption' or `attaint' of the bloodline of the supposed wrongdoer; if the act imposed a lesser punishment than death, there was no `attaint' and the bill was one of `pains and penalties.' (See **United States v. Lovett**, 328 U.S. 303, 317, fn. 6 [90 L.Ed. 1252, 1260, 60 S.Ct. 1073]; Coke, Commentary Upon Littleton (1st Am. ed. 1853), §§ 8.a, 134.b, note (1), 390.b, 391.a; 2 Blackstone, Commentaries (Cooley 4th ed. 1899) p. 1419). It has been consistently held that "[w]ithin the meaning of the Constitution, bills of attainder include bills of pains and penalties." (**Cummings v. The State of Missouri**, 71 U.S. (4 Wall.) 277, 323 [18 L.Ed. 356, 363]; see also **United States v. Lovett, supra**, 328 U.S. 303, 315 [90 L.Ed. at p. 1258]; **Ex Parte Garland,** 71 U.S. (4 Wall.) 333, 377 [18 L.Ed. 366, 369-370]) In modern application the definition is that `[a] bill of attainder is 'a legislative act which inflicts punishment without a judicial trial.' [Citations.]" (**Department of Social Welfare v. Gardiner**, [32 Cal.App.3d 225] 94 Cal. App. 2d. 431, 433 [210 P.2d 855].) Such `... legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in

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substantial harm, the burden of proof shall shift to the attorney to show that there is no reasonable likelihood that the harm will reoccur or continue."

such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution.' (**United States v. Lovett, supra,** 328 U.S. at pp. 315-316 [90 L. Ed. at p. 1259].)

The legislative act targeting California attorneys to have their licenses taken ex parte by a State Bar employee who recommends disbarment targets easily ascertainable members of a group to have their valuable property taken from them with no judicial trial. As a bill of attainder, the involuntary inactive enrollment statute is patently unconstitutional and unenforceable. Exhibit D.

X.
The Involuntary Inactive Enrollment Statute is Unconstitutional As There is No Post-Taking Prompt Final Adjudication

As held in **Conway**, in Justice Kaufman's dissent, at 1135, "Absent the requirement of a reasonably prompt postdeprivation notice of formal disciplinary charges, I would hold that section 6007, subdivision (c) violates due process. He stated, **Conway,** at 1134, "The Failure to Require a Prompt Disciplinary Hearing Constitutes a Violation of Due Process. Even assuming, arguendo, that the bar could constitutionally impose a temporary suspension pursuant to section 6007, subdivision (c), the absence of a statutory requirement that the bar also provide, within a *reasonably prompt* period of time, a full and final determination of the underlying disciplinary matter, renders the statute constitutionally suspect on its face. Indeed, the majority opinion concedes, in light of the "[reduced]" time an attorney has to meet the charges against him and the fact that he enjoys "fewer rights" than attorneys facing adverse action under other statutes, "that a final disposition is required *at some point* to validate the procedures governing

the predeprivation hearing." n7 (Maj. opn. at p. 1121, italics added.) In my view, however, such an amorphous time requirement is totally inadequate to protect the interests of a member placed on involuntary inactive enrollment pursuant to the expedited procedures of section 6007, subdivision (c).

Justice Kaufman went on to state, **Conway,** at 1135, "The United States Supreme Court has recognized that due process imposes restraints on the timing as well as the form of a postdeprivation hearing. The due process constraints will depend, in each case, "on appropriate accommodation of the competing interests involved." (**Goss v. Lopez** (1975) 419 U.S. 565, 579 [42 L.Ed.2d 725, 737, 95 S.Ct. 729]; see also **Cleveland Board of Education v. Loudermill** (1985) 470 U.S. 532, 557 [84 L.Ed.2d 494, 513-514, 105 S.Ct. 1487] [conc. and dis. opn. of Brennan, J.].) The relevant interests have been recognized as threefold: the importance of the private interest and the length or finality of the deprivation, the magnitude of the governmental interest, and the nature of the procedure used. (**Mathews v. Eldridge** (1976) 424 U.S. 319, 335 [47 L.Ed.2d 18, 96 S.Ct. 893]**; Goss v. Lopez, supra,** 419 U.S. at p. 579 [42 L.Ed.2d at pp. 737-738].). Weighing these factors, I cannot agree with the majority that due process is satisfied so long as the bar provides a final disposition `at some point.' It is undisputed that petitioner has a substantial property interest in his license to practice law. (**In re Ruffalo** (1968) 390 U.S. 544, 550 [20 L.Ed.2d 117, 122, 88 S.Ct. 1222].) The disruptions caused by the loss of one's license during the considerable period of time which may pass between the involuntary inactive enrollment and the commencement, much less completion, of final disciplinary proceedings may be truly devastating. Consider the impact on one's personal and professional life

of these months in limbo: the loss of wages, indeed of the opportunity to earn a living; the exhaustion of savings or conversion of possessions to replace wages; the possibility that one could not pay for even basic needs, such as food, clothing and rental or mortgage payments. The governmental interest in protecting the public from incompetent or unethical attorneys is substantial. However, that interest is adequately served once the attorney is placed on temporary suspension. Fairness compels that a reasonably prompt commencement of final disciplinary proceedings should immediately follow if it has not preceded the temporary suspension. The Massachusetts Supreme Court reached a similar conclusion in the **Matter of Kenney** (1987) 399 Mass. 431 [504 N.E.2d. 652]..."

The fact is that the delay has always been a minimum of two years and now is approaching five years from the time of a summary taking by way of inactive enrollment and a final adjudication with this Court. In every case the delay has been exorbitant and never prompt nor timely. C.f. **Lebbos v. State Bar** (1991) 278 Cal. Rptr. 845, cert. denied 116 L. Ed. 2d. 289, (twenty-five months), **Jones v. State Bar** (1989) 261 Cal. Rptr. 397 (three years), **Coombs v. State Bar** (1989) 262 Cal. Rptr. 554 (two years nine months), **Cannon v. State Bar** (1989) 275 Cal. Rptr. 433 (over two years), and now pending for four years and continuing in **In the Matter of Phillips** (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 47, 49. There are no expedited procedures. Involuntary inactive enrollment orders are de facto disbarments. The State Bar deliberately delays processing these cases so that the attorney is rendered impotent to seek court access or review. Since the reality is that there is and has never been any prompt, post-taking final determination, the involuntary inactive enrollment statute is unconstitutional. **Barry v. Barchi**

(1979) 443 U.S. 55, 64, 61 L.Ed.2d 365, 375, 99 S.Ct. 2642, **Gershenfeld v. Justices of the Supreme Court of Pa.** (E.D.Pa. 1986) 641 F. Supp. 1419, **In re Malvin** 466 A.2d at 1223; **In re Ellis** 680 N.E.2d 1154.

XI.

The Involuntary Inactive Enrollment Statute is An Unconstitutional Bill of Attainder

While emergency suspensions of attorney's licenses is provided for in other jurisdictions, the standards for their issuance are precise and are those for the issuance of a preliminary injunction; the entity doing the taking is the licensing constitutional court; and those jurisdictions, unlike California, have ABA approved professional responsibility rules. Moral turpitude has been rejected as a cause for discipline in all other jurisdictions within the United States due to its vagueness. Only California still retains it. Section 6106. Exhibit D.

Federal Rule of Civil Procedure 65 sets forth the legal standards governing the issuance of a preliminary injunction as follows: To obtain a preliminary injunction a party must demonstrate either 1) a combination of probable success on the merits and the possibility of irreparable injury, or 2) the existence of serious questions going to the merits and that the balance of hardships tips sharply in its favor. **Metro Pub. Ltd. v. San Jose Mercury News**, 987 F.2d 637,639 (9th Cir. 1993); see also 13 Moore's Federal Practice, S 65.22[5][i] (Matthew Bender 3d ed. 1997). These alternatives represent extremes in a continuum, rather than two separate tests. These two formulations represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases. **United States v. Nutricology, Inc.,** 982 F.2d 394, 397 (9th Cir. 1992). In granting

the preliminary injunction, the district court focuses its analysis on the probability of success/irreparable injury test. See **Oakland Tribune, Inc. v. Chronicle Publishing Co.**, 762 F.2d 1374, 1376 (9th Cir. 1985) (quoting **Apple Computer, Inc. v. Formula Int'l, Inc.**, 725 F.2d 521, 523 (9th Cir. 1984)).

When the standards of a preliminary injunction are not complied with and a showing is not made of a high probability of success on the merits and irreparable, imminent, and severe actual harm, the emergency suspension is unconstitutional. **In the Matter of Russakoff** 79 N.Y.2d 520, 593 N.E.2d 1357, 583 N.Y.S.2d 949(1992). The Utah Supreme Court set forth the requirement **In the Matter of Trujillo,** 2001 UT 38 as follows:

> "Like the first element of rule 18, there is neither an explicit nor an implicit requirement of intent in the second element--the requirement that the OPC prove by clear and convincing evidence that the attorney "poses a substantial threat of irreparable harm to the public." RLDD 18(a). Courts in other jurisdictions interpreting similar rules have noted that interim suspensions have the same effect as preliminary injunctions. See, e.g., **People v. Varallo**, 913 P.2d 1, 6 (Colo. 1996) (en banc) ("Immediate, temporary, or interim suspensions have the same effect as preliminary injunctions."), cert. denied, 519 U.S. 822 (1996); **In re Malvin**, 466 A.2d 1220, 1223 (D.C. 1983) (noting that "[t]he temporary suspension of an attorney pending the completion of disciplinary proceedings has the same effect as a preliminary injunction barring that attorney from the practice of law"). Accordingly, in determining whether an attorney poses a threat of harm to the public, these courts have applied the standards governing the

> issuance of preliminary injunctions, adapted to the context of a professional disciplinary proceeding. See **In re Malvin,** 466 A.2d at 1223; **In re Ellis**, 680 N.E.2d 1154, 1160 (Mass. 1997); see also Francis M. Dougherty, Annotation, Validity and construction of procedures to temporarily suspend attorney from practice, or place attorney on inactive status, pending investigation of, and action upon, disciplinary charges, 80 A.L.R.4th 136, 154 n.6 (1990) (stating that a "number of courts" have adopted the District of Columbia Court of Appeals' analysis in **In re Malvin**, applying the standard for issuing preliminary injunctions in determining whether an attorney should be temporarily suspended from the practice of law, pending final disposition of disciplinary proceedings). We find this reasoning persuasive and adopt it here."

The involuntary inactive enrollment statute does not comply with the constitutional requirements for issuance of an emergency suspension prior to a final judgment by this Court. There is no irreparable, imminent, or severe harm required. There is solely a requirement of a threat. The threat is of an unspecified harm. The threat is to interests rather than persons. The threat to interests may be to any claimed "public" interest. California' standard of "a substantial threat of harm to the interests of the public or the attorney's clients," is unconstitutional. It fails to have a required exigent standard justifying denial of the attorney's due process rights to constitutional review and action by his licensing court of law .

The fact that the three findings may include a claim that an attorney "is causing" substantial harm to the public indicates that no former acts are being judged, but a legal conclusion without trial as to the on-going acts of the attorney. The fact that "substantial harm" is substituted for

the requirement of irreparable harm indicates that no emergency, in fact, justifies the emergency suspension. The fact that the second required finding that the public or clients are likely to suffer injury does not require a finding of actual irreparable harm to anyone indicates that this standard is unconstitutional for non-exigency and for lack of substantiality. The fact that the third finding is solely that there is a reasonable probability that the State Bar will prevail on the merits of the underlying disciplinary matter rather than the required finding that there is a likelihood of success on the merits indicates that ephemeral probabilities are substituted for the requirement of actual fact of success on the merits. There is always a probability that some violation may be found. Such a probability does not establish any exigent circumstances justifying an emergency suspension.

Since this case involves one investor and one civil judgment in a thirty-five year career, there is no possibility of a finding of any harm to the attorney's clients or to the public. No client or public is involved. There is no possibility of a finding that the attorney's clients or the public are likely to suffer injury if the taking of the attorney's license is not granted. There are no clients or the public involved. There is no possibility of a finding that the State Bar has any probability of success on the merits. It presented no evidence. For lack of any compliance with the substantive requirements for an emergency suspension, California's involuntary inactive enrollment statute is unconstitutional for denial of substantive due process of law both facially and as applied. **In re: Ruffalo** (1968) 390 U.S. 544, 551, 88 S.Ct. 1222, 1226, 20 L.Ed. 2d. 117, **Schware v. Board of Examiners** (1957) 353 U.S. 232, 77 S. Ct. 752, 1 L. Ed. 2d. 796, and **Spevack v. Klein**, 385 U.S. 511, 515.

The California standards for an emergency suspension are also unconstitutional for vagueness. The vagueness may be from uncertainty in regard to persons within the scope of the act . . . or in regard to the applicable tests to ascertain guilt." **Winters, Colten**. . Statutes that lack the requisite definiteness or specificity are "void for vagueness." **Papachristou, Smith, Thornhill, United States v. National Dairy Corp. , Lanzetta** and **Connally**.

Just as a statute which states that a person not engaged in a lawful occupation, known to be a member of a gang, who has been convicted at least three times of being a disorderly person or of any crime, is considered to be a gangster and subject to a fine or imprisonment has been held unconstitutional for vagueness, the statute at issue presupposes because one State bar employee, with admittedly no evidence, does not like this attorney or the civil judgment entered against him and thinks the attorney is unworthy of his personal standards for an attorney and should be disbarred, that that justifies imposition of a penalty of a quasi-criminal nature of taking the attorney's right to work summarily. Such is illogical and just as unconstitutional as claiming a person is guilty of a crime if someone thinks he is in a gang. It is too vague and illogical a standard. **Lanzetta** and **Edelman v. California** 344 U.S. 357 (1953)

As in **Papachristou** the involuntary inactive enrollment statute as well as the underlying moral turpitude standard is invalid, because they do not give fair notice, do not require specific intent to commit an unlawful act, permit and encourage arbitrary and erratic suspensions, commit too much discretion to one State Bar employee and punish activities which by modern standards are normally innocent. When the standard for the imposition of the quasi-criminal punishment of denial of the right to work and use a vested license to do so is if someone thinks the

attorney guilty of "some misconduct" though innocent of the crime with which he was charged, this is an unconstitutional standard. **Giaccio v. Pennsylvania** 382 U.S. 399(1966). By reason of vagueness and non-exigency, the involuntary inactive enrollment statute is patently unconstitutional as it fails to provide substantive due process of law. It permits arbitrary, capricious, and erratic takings of vested licenses to practice law by a solo State Bar employee before a proceeding may be concluded and when that person is required to have no mental or legal competence, no training, and no knowledge of the applicable law and is solely a Governor's political appointee.

XII.
The Involuntary Inactive Enrollment Statute is the Unlawful Delegation of Judicial Power to A Private Person

As set forth by the United States Supreme Court in **Keller v. State Bar of California** 496 U.S. 1 (1996) the "The State Bar is not a typical 'government agency.' The Bar's principal funding comes from dues levied on its members rather than from appropriations made by the legislature; its membership is composed solely of lawyers admitted to practice in the State; and its services by way of governance of the profession are essentially advisory in nature, since the ultimate responsibility of such governance is reserved by state law to the State Supreme Court." While this Court in **Conway** dealt with interference to its prerogatives and ruled that letting a State Bar employee take a license summarily was fine with it, the issue is not this Court's desires, but the due process rights of attorneys under the United States Constitution.

Attorneys are licensed by a State's highest Court. They are "Court officers." As the United States Supreme Court

has consistently held, he who grants the license is the only one who may take it away. Licensing of a Court officer requires a Court. The involuntary inactive enrollment statute has no Court. **Cummings, Ex Parte Garland**.

Unaddressed in **Conway** is the rights of attorneys who have relied in seeking and obtaining a license from this Court on this Court not bargaining away their rights to a constitutional court of law where constitutional issues may be heard and decided by a competent tribunal before any taking of that license may be ordered. As stated in **Hirsh v. Justices of California Supreme Court** 67 F. 3d. 708 (Ninth Cir. 1995), at 708, "The California Constitution bars the Bar Court from considering federal constitutional claims." This means that this Court has delegated its judicial duties toward its own Court officers to any private person employed by a private entity to just summarily take that license if he feels like it and with no ability in that person to decide any constitutional claims.

The standard of the taking is vague, ephemeral, requires no evidence, no hearing, permits no defense, has no fair notice, and no fair, impartial, or competent adjudicator and no ability to raise and have decided any constitutional claims prior to the taking. The fact that this Court has indicated that it shall not review an attorney's petition even before a taking and has not done so in over ten years completes the abdication by this Court of its judicial duties owed to its Court officers . ." **In re Rose** (2000) 22 Cal.4th 430, 93 Cal.Rptr.2d 298; 993 P.2d 956 (Mar. 6, 2000).[8]

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[8] **Rose** maintains a mask that if issues are framed so as to fall within the ambit of "when it appears necessary to settle important questions of law, the State Bar is without or in excess of jurisdiction, no fair hearing, no support in the weight of the evidence, or discipline not appropriate," that the California Supreme Court may decide to grant

This is the unlawful delegation of the totality of judicial power this Court is duty bound to exercise for its Court officers to a private person with a standard less sweep and no rights to any due process of law. "The delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this court which foreclose the question." **Schechter Poultry Corp. v. United States**, 295 U.S. 495, at 537, 55 S.Ct. 837, 97 A.L.R. 947; **Eubank v. Richmond**, 226 U.S. 137, 143, 33 S.Ct. 76, 42 L.R.A.(N.S.) 1123; **Washington ex rel. Seattle Trust Co. v. Roberge** 278 U.S. 116, 121, 122 S., 49 S.Ct. 50, 86 A.L.R. 654. C.f. **In re Ruffalo, Schware, Spevack.** [9]

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review. California Rules of Court, Rule 954(a). Constitutional issues are not a grounds for review.

[9] Justice Kaufman, in dissent in **Conway**, dealt with this unlawful delegation of judicial power issue which the majority claimed was not at issue. He stated in **Conway** at footnote 4 that "The majority errs in concluding that our decisions permit the bar to impose a *temporary* disciplinary suspension, so long as such discipline is not "final" and is subject to "review." (Maj. opn. at p. 1120, fn. 7.) The issue is *power*, not timing. The cases unequivocally hold that only the courts may impose a disciplinary suspension or disbarment. " He stated that, "It is plain that the proceedings of the bar in this matter cannot withstand constitutional scrutiny....[O]nly the courts may suspend an attorney for disciplinary purposes. (**Saleeby v. State Bar, supra**, 39 Cal.3d at p. 557; **Hustedt v. Workers' Comp. Appeals Bd., supra,** 30 Cal.3d at pp. 336-337, 339; **Brotsky v. State Bar, supra,** 57 Cal.2d at pp. 300-301; **In re Shattuck, supra**, 209 Cal. at p. 12.) The Legislature may delegate to the bar, as an administrative arm of the courts, the authority to investigate and to make recommendations in such matters; it may not, however, delegate the inherent judicial prerogative to discipline by means of disbarment or suspension. (**Hustedt** ...at 339; **Brotsky**... at 300-301. Though styled an "inactive enrollment," the effect of the referee's order is clearly that of a "temporary" disciplinary suspension.

Based on the foregoing, the involuntary inactive enrollment statute is patently unconstitutional as the unlawful delegation of judicial power to license attorneys to a private employee in a legislatively created privately financed advisory entity that is not, as stated by the United States Supreme Court in **Keller**, part of the government of the State. **Eubank v. Richmond** 226 U.S. 137, 143.

XIII.
The Involuntary Inactive Enrollment Statute Denies Equal Protection and Procedural Due Process of Law

The summary taking of a license to practice law is permitted by a State Bar employee regardless of whether there is evidence or grounds; with no rational basis for a classification that some attorneys are entitled to no notice, evidence, grounds, cross-examination, confrontation, impartial adjudicator, or any review of any constitutional issues before a taking; and in a hastened manner which precludes preparation or defense. The "hurry up and get rid of our opponents" mentality of the State Bar in the face of their dire financial circumstances and closure for improprieties for two years with their multiplicity of conflicts of interests renders the involuntary inactive enrollment statute an executioner's death weapon delivered to those who are the least competent to wield it well or fairly.

Hence, the provisions of section 6007, subdivision (c) which permit the bar to order the involuntary inactive enrollment of an attorney are patently unconstitutional. (emphasis added)."

A. A Summary Taking with no Grounds is Unconstitutional

In this case, the judge admitted there was no evidence presented. Refer footnote 1. The prosecutor presented no evidence. The State Bar employee copied what the first hearing judge had written even though all of those findings had already been rejected for insufficiency of the evidence to prove any charge by the review department. Refer footnotes 1 and 2. He admitted the prosecutor presented no evidence, yet this judge knowingly and unlawfully ex parte took a thirty-five year license to practice law of this attorney and will do so again out of personal whim, caprice, political partisanship as an undisclosed former member of the board of the prosecuting party, and so as to act out his partisan role in the pending federal court litigation in which he is a defendant. Attorney Joseph M. Alioto, the son of the Mayor of San Francisco, had a multi-million dollar punitive damage award imposed against him by his clients in a class action lawsuit for legal malpractice and fraud. The State Bar said it had no jurisdiction and no grounds to initiate any action. Yet here a state bar political appointee employee wants to de facto disbar a thirty-five year practicing attorney who has no record when this judge has no mental or legal pre-screening for competence, has received no training in any disciplinary law, has no knowledge of any disciplinary law, is a partisan for the prosecuting party, and because he doesn't like the fact that this attorney suffered a much less punitive damage award than Attorney Alioto.

This involuntary inactive statute is patently unconstitutional as it permits whim, caprice, bias, bigotry, prejudice, and rabid partisans to revoke licenses of lawyers based on, as here, no grounds and no evidence. As held in **Foucha v. Louisiana** 504 U.S. 71 (1992), "...[T]he Due

Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions `regardless of the fairness of the procedures used to implement them.'" **Zinermon v. Burch** 494 U.S. 113, 125 (1990). See also [**United States v. Salerno**, 481 U.S. 739, 747-748 (1987), at 746; **Daniels v. Williams** 474 U.S. 327, 331 (1986). ... We have always been careful not to `minimize the importance and fundamental nature" of the individual's right to liberty. **Salerno, supra**, at 750." An attorney's license to practice law is valuable property and a liberty interest protected by the due process and equal protection clauses of the United States Constitution. As held in **Conway**, "We note at the outset that petitioner plainly has a property interest in the right to practice his profession that cannot be taken from him without due process. **Barry v. Barchi** (1979) 443 U.S. 55, 64 [61 L.Ed.2d 365, 375, 99 S.Ct. 2642]; **Civil Service Assn. v. City and County of San Francisco** (1978) 22 Cal.3d 552, 560 [150 Cal.Rptr. 129, 586 P.2d 162]; see also **Giddens v. State Bar** (1981) 28 Cal.3d 730, 735 [170 Cal.Rptr. 812, 621 P.2d 851])."

As stated in **Willner v. Committee on Character** 373 U.S. 96 (1963), at 102, "...[T]he requirements of ...due process must be met before a State can exclude a person from practicing law." A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment." **Schware** at 238-239. As the Court said in **Ex parte Garland** at 379, the right to practice law is not "a matter of grace and favor." **Willner** makes clear, at 238, that, "A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment. (footnote omitted) **Dent v.**

West Virginia, 129 U.S.114. Cf. **Slochower v. Board of Education** 350 U.S. 551; **Wieman v. Updegraff** 344 U.S. 183. And see **Ex parte Secombe**, 19 How. 9, 13. A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law. **Douglas v. Noble**, 261 U.S. 165; **Cummings** at 319-320. Cf. **Nebbia v. New York,** 291 U.S. 502. Obviously an applicant could not be excluded merely because he was a Republican or a Negro or a member of a particular church. Even in applying permissible standards, officers of a State cannot exclude an applicant when there is no basis for their finding that he fails to meet these standards, or when their action is invidiously discriminatory. Cf. **Yick Wo v. Hopkins**, 118 U.S. 356."

The filing of a recommendation of disbarment by a political appointee has no rational connection with an attorney's fitness to practice law. It is an act that bears no relationship to the education, training, honesty, competence, or professional responsibility of an attorney toward his clients, the courts, tribunals, or those involved in his use of his license to practice law or with his practice of law As stated in **Kelley v. Johnson** 425 U.S. 238, 244 (1976), "It is true, as that court observed, that the Due Process Clause of the Fourteenth Amendment not only accords procedural safeguards to protected interests, but likewise protects substantive aspects of liberty against impermissible governmental restrictions."

The taking of an attorney's license to practice law because a political appointee of a Democratic governor is an undisclosed partisan for the prosecuting party and wants to make money for it is the antithesis of grounds for a *de facto* disbarment Yet there admittedly was no evidence

presented. A license to practice law is valuable property which may not be taken on whim, pique, ire, ignorance, or hostility toward the constitutional rights of an attorney in an attorney disciplinary proceeding. See **Fuentes v. Shevin** 407 U.S. 67 (1972). The involuntary inactive enrollment statute is patently unconstitutional. It offends the substantive due process clause as the taking of a license to practice law because a prosecuting party's political appointee recommends disbarment while admitting there was no evidence presented has no relationship to fitness to practice law. It is irrational and capricious. Since it is patently violative of substantive due process of law to recommend disbarment when no evidence was presented, this involuntary inactive enrollment proceeding is patently unconstitutional as an irrational and arbitrary proceeding.

B. There is No Fair and Impartial Adjudicator

There are three facts rendering the involuntary inactive enrollment proceedings patently unconstitutional for lack of a fair and impartial adjudicator: The judge sits as a judge in his own cause, the judge has prejudged the merits, and the judge is an employee of the prosecuting party and financially interested in his decision-making.

A. Reviewing his Own Decision

A judge is disqualified when he sits as a judge in his own cause. **In re: Murchison** 349 U.S. 133, 136, 75 S. Ct. 623, 655, 99 L. Ed. 942; **Aetna Life Insurance Co. v. Lavoie** 475 U.S. 813 (1986); and **Liljeberg v. Health Services Acquisition Corp.** 486 U.S. 847 (1988).

The judge who made the recommendation of disbarment reviews his own decision when he presides to decide whether there is a reasonable likelihood that he will succeed on his own decision and therefore may summarily take an attorney's license to practice law. The fact that one

of the three required findings to justify a summary taking by a State Bar employee of a license is whether the judge is right in his disbarment recommendation renders him an unqualified and biased adjudicator in violation of fundamental due process of law. Evidence and law presented by an accused showing that the judge's disbarment recommendation is flawed and there is no probability that the judge shall succeed is forced to be presented to the judge whose flawed decision is at issue. The judge is reviewing his own decision. This denies to the accused a fair and an impartial adjudicator as is required for due process of law. The self-interest of the judge in vindicating his own decision is a temptation not to hold the balance nice, clear, and true as is required for due process of law. **Tumey v. Ohio** 272 U.S. 510,532, 47 S. Ct. 437,444, 71 L. Ed. 749 (1927) and **Ward v. Village of Monroeville** 409 U.S. 57, 93 S. Ct. 80, 34 L. Ed. 2d. 267 (1972).

It is also judicial misconduct. California Judicial Code Conduct Canon 3 (E) (3) (f) provides that a judge is automatically disqualified when "The justice i) served as the judge before whom the proceeding was tried or heard in the lower court."

In this case, the judge admitted that no evidence was presented by anyone. He, therefore, has admitted there is no probability of any success on the merits of his decision, yet it is impossible for him to admit that he already took the attorney's license ex parte in deliberate violation of the law. The involuntary inactive enrollment statute is patently unconstitutional for lacking an impartial adjudicator.

B. Prejudgment of the Merits

The second issue of lack of an impartial adjudicator is that the adjudicator has prejudged the merits of the

summary taking already. His recommendation of disbarment presupposes that he has decided that substantial injury to someone's interests has occurred, is likely to reoccur, that the interests of someone are greater than that of the accused attorney; and that no remedy exists except to disbar the attorney. When a judge writes his opinion on the merits before conducting a hearing he is disqualified for prejudgment. "The term 'prejudice' in the Cal Civ. Proc. Code § 170.5 [now 170.1(a)(6)], is defined as follows: 'prejudice' imports the formation of a fixed anticipatory judgment as contradistinguished from those opinions which may yield to substantial evidence. It includes the forming of an opinion without due knowledge or examination, although it does not necessarily indicate any ill feeling. The bias or prejudice which may disqualify a judge must be of a character calculated to seriously impair his partiality and sway his judgment." **Pacific and Southwest Annual Conference of the United Methodist Church v. The Superior Court of San Diego County** (1978) 82 Cal. App. 3d 72, 87. As held in **Pacific**, "A judge may not properly try a case where he has formed partisan opinions from outside sources..." "Where a judge gratuitously offers an opinion on a matter not yet pending before him and thereby shows a bias or prejudice against a party, a writ of mandate will issue precluding the opining judge from hearing that matter." **Calhoun v. Superior Court** 51 Cal.2d 257, 261 [331 P.2d 648].)

As stated in **Pacific,** "Bias is defined as a mental predilection or prejudice; a leaning of the mind; a predisposition to decide a cause or an issue in a certain way, which does not leave the mind perfectly open to conviction. Bias or prejudice consists of a mental attitude or disposition of the judge towards a party to the litigation."

In defining bias, **Adoption of Richardson**, 251 Cal.App.2d 222 [59 Cal.Rptr. 323] illustrates the concept: "Bias equates here with partiality. Here the judge had a fixed opinion of the unfitness of petitioners solely because they were deaf-mutes. He was under some influence which so swayed his mind in one direction as to prevent his deciding the case according to the evidence. This leaning or inclination against all deaf-mutes without regard to their character, abilities and demonstrated fine qualities is inconsistent with a state of mind fully open to conviction which the evidence might produce. One whose opinion is preconceived and expressed in writing with reference to particular persons or situations is obviously inclined to that view, and considerable evidence would ordinarily be necessary before those positively expressed impressions could be removed and his mind restored to the straight line of impartiality." (*Id. at pp. 232.* Matters indicating prejudice and prejudgment need not appear in an *ex parte* communication, but may appear on the record. **Pratt v. Pratt** (1903) 141 Cal. 247

It is also judicial misconduct for a judge to sit on a case when he has prejudged the merits. In **Fletcher v. Commission on Judicial Performance** (1998) 19 Cal. 4th 865, the judge was removed from office. The Supreme Court held that the trial judge committed prejudicial misconduct as he had prejudged the credibility of witnesses, had a mandatory duty to disclose his interest in the proceeding, failed to make the required disclosure, and failed to disqualify himself. Since the involuntary inactive enrollment statute permits a judge to prejudge the merits of the taking and this judge has definitely done so as he already took the attorney's license ex parte illegally, the proceeding is patently unconstitutional for lacking a fair and impartial adjudicator.

C. The Partisan Role of the Judge

The judge in this proceeding failed to disclose his position as a former member of the Board of Governors of the State Bar that is the prosecuting party. This is judicial misconduct and disqualified him from this case. He failed to disclose his position as a co-defendant with that prosecuting party sharing the same attorney on the merits of on-going federal litigation concerning the unconstitutionality of the moral turpitude statute at issue. This disqualified him for partisanship as well as is also judicial misconduct. In all events, the institutional partisan role of the judge as an employee of the prosecuting party, who is provided his salary, benefits, perks, office, parking space, staff, and all of his resources and training, and who obtains money for his privately financed employer by finding guilt of accuseds renders his partisanship so pronounced that he is automatically disqualified. Section 6086.5, 6079.1, 6086.10, 6140. See **Aetna** and **Liljeberg, Leverett v. Town of Limon** 567 F. Supp. 471 (D. Colo 1983), **In the Matter of Ross** 656 P. 2d. 832 (Nev. 1983), **Lam v. University of Hawaii** 40 F. 2d. 1551 (Ninth Cir. 1994), **McClure v. Harris** 503 F. Supp.. 357 (N.D. Ill. 1979), **Hoberman v. Lock Haven** 377 F. Supp. 1178 (M.D. Pa. 1974), **United Church Etc. v. Medical Center Com'n** 689 F.2d. 693 (Seventh Cir. 1982), **Wall v. Optometric Association** 379 F. Supp. 175, affd. 95 S. Ct. 166 (N.D. Ga 1974), **Yamaha v. Motor Corp., USA. v. Riney** 21 F. 3d. 793 (Eighth Cir. 1994)

By reason of a judge reviewing his own decision, his prejudgment, and his partisan role for and on behalf of a prosecuting party, the involuntary inactive enrollment statute is patently unconstitutional for lack of an impartial adjudicator.

D. The Statute Denies Equal Protection of the Law

Equal protection of the laws under the fourteenth amendment to the United States Constitution is violated when "the classification rests on grounds wholly irrelevant to the achievement of the State's objective," **McGowan v. Maryland,** 366 U.S. 420, 425 (1961), or if the objective itself is beyond the State's power to achieve, **Gomillion v. Lightfoot**, 364 U.S. 339 (1960); **NAACP v. Alabama** 377 U.S. 288 (1964); **Douglas v. California**, 372 U.S. 353 (1963).

The equal protection clause does require that, in defining a class subject to legislation, the distinctions that are drawn have `some relevance to the purpose for which the classification is made.' Baxstrom v. Herold, 383 U.S. 107, 111; Carrington v. Rash, 380 U.S. 89, 93; Louisville Gas Co. v. Coleman, 277 U.S. 32, 37; Royster Guano Co. v. Virginia, 253 U.S. 412, 415. There is no relevance to this attorney being targeted for summary disbarment. The only factor is that one State Bar employee on retrial, without evidence, wants to increase the punishment from a suspension to his being able to disbar the attorney. This denies the equal protection of the law and is patently unconstitutional. See Rinaldi v. Yeager 384 U.S. 305 (1966)

While the equal protection issue was not addressed in **Conway**, Justice Kaufman, in dissent in **Conway**, held the involuntary inactive enrollment statute is unconstitutional for denying to certain attorneys the equal protection of the law. He stated, **Conway,** at 1137, the following:

> "*Petitioner Was Denied Equal Protection of the Law*
>
> Aside from the separation-of-power and due process infirmities apparent from the face of the statute, it is also clear that petitioner was denied equal protection of

the law under section 6007, subdivision (c) as applied....

....It is well settled that the state `cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment' (**Schwartz v. Board of Bar Examiners** (1957) 353 U.S. 232, 238-239 [1 L.Ed.2d 796, 801-802, 77 S.Ct. 752, 64 A.L.R.2d 288]), nor `arbitrarily foreclose to any person the right to pursue an otherwise lawful occupation.' (**Purdy & Fitzpatrick v. State of California** (1969) 71 Cal.2d 566, 579 [79 Cal.Rptr. 77, 456 P.2d 645, 38 A.L.R.3d 1194]... (citation omitted)

There is nothing in the statute or the record to justify the bar's disparate treatment of petitioner. `Action is arbitrary not only when it is capricious, but also if it lacks adequate support in the record, when the facts do not justify the conclusion.' (**Bogacki v. Board of Supervisors** (1971) 5 Cal.3d 771, 786-787 [97 Cal.Rptr. 657, 489 P.2d 537], quoting **Hollon v. Pierce** (1967) 257 Cal.App.2d 468, 478 [64 Cal.Rptr. 808].) The record and the statute in question yield absolutely no rational basis for the bar's decision to proceed against petitioner under the provisions of subdivision (c) rather than the more directly applicable provisions of subdivision (b). The only plausible reason for singling out petitioner was the fact that the bar was put to far less inconvenience under the relaxed notice, discovery and evidentiary rules of subdivision (c). That, in my estimation, does not constitute a legitimate basis of distinction....

> Though the majority purports to find `no lack of justification for the different procedures" under subdivisions (b) and (c) of section 6007 (maj. opn. at p. 1117), in point of fact the only justifications they offer are baseless. There was no legitimate reason to deny petitioner in this matter the full range of procedural protections otherwise accorded members of the bar under section 6007, subdivision (b). For this reason, I would hold that section 6007, subdivision (c) is invalid as applied."

XIV.
The Taking of This Attorney's License is a Vindictive Sentencing

The United States Supreme Court has held unconstitutional vindictive sentencing when after a conviction has been set-aside on appeal, there is a retrial for the same offense, and the judge punishes the accused by imposing a harsher sentence than that originally imposed. **North Carolina v. Pearce** 395 U.S. 711 (1969). That is this case and renders this proceeding patently unconstitutional. The first hearing judge recommended a three-year suspension. Exhibit B. The review department reversed his findings of fact. They were reversed for insufficiency of the evidence. His conclusions of law were also reversed. Exhibit B. On remand, the second hearing judge stated that no evidence was presented. He states, however, that he adopts each of the reversed hearing judge's findings of fact and his conclusions of law. He, in fact, copies them word for word. He then recommends disbarment, ex parte takes the attorney's thirty-five year license to practice law, and now proposes doing it again. This is a de facto disbarment. As held in **North Carolina**, due process "requires that vindictiveness against a

defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial." Id., at 725. "In order to assure the absence of such a motivation," the United States Supreme Court held that `whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding.'" Id., at 726.

Since the recommendation of disbarment contains no new objective information concerning any identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding, and the attorney has had no new complaints or proceedings, this proceeding to summarily take the attorney's license now rather than await review and reversal again is patently unconstitutional as a vindictive sentencing.

Conclusion

This proceeding involves one case, one person, an investor, one civil judgment, one claimed act of moral turpitude, one claimed violation of the business transaction rule, and one failure to report a judgment within thirty days. This involves an attorney who has practiced law with no record of any kind for thirty- five years. Never in the history of the State Bar has an attorney been disbarred on such facts. Mayor Alioto's son who had a multi-million dollar punitive damage award imposed on him for fraud by his class action clients was not even charged, the State Bar stating it had no jurisdiction. There is no rational reason to disbar this attorney when a mayor's son on worst facts escaped being charged at all.

Admittedly there have been two trials. The attorney has been barred from defending himself both times. The evidence and findings were found to be insufficient to find culpability after the first trial and the recommended suspension was voided. The moral turpitude charge was then changed without notice. Automatic guilt of it was found with no trial or notice by the review department. It has made new law claiming any punitive damage award is ipso facto an act of moral turpitude. It found guilt then remanded to find the facts to support the guilt finding already made. No evidence was introduced at the second trial. The second hearing judge, a political appointee and undisclosed partisan as a former board member of the prosecuting party, ex parte took the attorney's thirty-five year license and recommended disbarment. He now shall do so again unless this Court grants the application for a Stay and entertains these extremely serious United States Constitutional issues.

The Petition should be entertained to decide the constitutional issues presented herein.

RESPECTFULLY SUBMITTED,
Dated : February 6, 2002

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B. BRUCE KITTRELL
Petitioner Attorney ***Pro Se***

Verification

I declare under penalty of perjury the above Petition is based on my own personal knowledge, information, and belief, and this verification is executed this 6th day of February, 2002 at Torrance, California.

Dated : February 6, 2002
s/_____
B. BRUCE KITTRELL
Petitioner Attorney ***Pro Se***